CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 71

H. C. JONES, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

THE LIBERTY GLASS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 12, 1947
CERTIORARI GRANTED JUNE 2, 1947

SUPREME COURT OF THE UNITED STATES

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(Caption omitted.)

1 In the United States District Court in and for the Western District of Oklahoma

No. 1724

THE LIBERTY GLASS COMPANY, PLAINTIFF

v.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE, DEFENDENT

Complaint

Filed November 3, 1944

Comes now the Liberty Glass Company, plaintiff herein, and shows to this court as follows:

That it is a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Sapulpa, Creek County, Oklahoma.

That the defendant is the duly appointed, qualified and acting Collector of Internal Revenue in the State of Oklahoma.

That on or about the 15th day of June 1939, your plaintiff filed with this defendant its income tax return for the year 1938, after having secured an extension of three months from March 15, 1939, in which to file same.

That said tax return so filed showed a taxable net income for the year 1938 in the sum of $9,058.90, with tax due thereon in the sum of $1,193.25; that during the year 1939 plaintiff paid said $1,193.25 in the manner and on the dates as set out in Exhibit "A" attached to this Complaint, which exhibit is a copy of the claim plaintiff filed with the defendant Collector of Internal Revenue, and which will be hereinafter referred to in more detail.

2 That in November, 1939 one Thomas S. Depew, Internal Revenue Agent, made an examination of the 1939 return of this plaintiff and made a report that the taxable income of this plaintiff for the year 1938 was $10,191.29, which resulted in an additional tax of $158.53 assessed against this plaintiff, and which plaintiff paid.

That in November, 1940 a re-examination was made of the 1938 return filed by this plaintiff by Carl E. Latta, a revenue agent, and his report was dated December 26, 1940, in which report he found that during the year 1938 this plaintiff had a taxable net income of $42,139.48, which resulted in an assessment in the sum of $7,992.59, and after deducting the amounts previously paid, as hereinabove set out, left due an additional tax for said

year in the sum of $6,649.81, which amount was paid by this plaintiff on the 8th day of March, 1941.

That the report and computation of tax made by said Carl E. Latta, hereinabove set out, was erroneous and illegal, for the reason that said Carl E. Latta failed to allow any credit for the money used to retire indebtedness of The Liberty Glass Company in the sum of $75,191.78, and said Liberty Glass Company, this plaintiff, was entitled to a credit of 2½% of $42,138.78, of $1,053.49; that in making said assessment said agent, Carl E. Latta failed to give credit for the amount used to retire indebtedness after the taxable income of The Liberty Glass Company had been raised to an amount in excess of $25,000.00.

That by so doing, the sum of $1,053.49 was not only illegal, it was not an assessment in the prescribed form, and was not a tax, but it was an illegal extraction of a payment from the taxpayer; and the recovery thereof should be controlled by Section 3313 of the Internal Revenue Code and should not be controlled by Section 322 of said Internal Revenue Code.

That your plaintiff relied upon the correctness of the report made by said Carl E. Latta and paid the amount as shown thereby; that thereafter your plaintiff discovered the erroneous and illegal payment so made by plaintiff, and on the 30th day of March, 1944, plaintiff filed with defendant, Collector of Internal Revenue, a claim for refund in the sum of $1,053.49; that said claim
3 was filed upon forms and in the manner prescribed by the Internal Revenue Department, same being Form No. 843, which claim had attached thereto a full and complete statement of the computations heretofore mentioned in this Complaint, together with a statement of all the transactions; that to said claim there were attached Schedules 1 and 2, which set out a full and complete statement of the transactions on indebtedness of The Liberty Glass Company, plaintiff, for the year 1938, and a detailed statement of the amounts used to retire indebtedness in said year 1938; that a copy of said claim, with a statement of the transactions and Schedules 1 and 2 attached is hereto attached, marked Exhibit "A" and made a part hereof.

That thereafter, and on or about June 23, 1944, the Commissioner of Internal Revenue, acting by and through Norman D. Conn, Deputy Commissioner, disallowed said claim, on the only grounds and for the sole reason that same was not filed within the time provided by the laws of the United States; that a copy of said letter is attached hereto, marked Exhibit "B" and made a part hereof.

That by reason of the matters hereinabove set out, this defendant is indebted to your plaintiff in the sum of $1,053.49, with interest thereon from the 8th day of March, 1941.

Wherefore, your plaintiff, The Liberty Glass Company, prays

gment against defendant, H. C. Jones, Collector of Internal Revenue for the State of Oklahoma, in said sum of $1,053.49, with interest therein from the 8th day of March 1941, together with the costs of this action.

THE LIBERTY GLASS COMPANY,
Plaintiff.

By EARL FOSTER, *Its Attorney,*

4 *Exhibit A to complaint*

Claim

To be Filed with the Collector Where Assessment was made or Tax Paid.

[Collector's stamp (Date received)]

The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Oklahoma, County of Creek, ss:

[Type or Print.]

Name of taxpayer or purchaser of stamps The Liberty Glass Company.

Business address: Collins Bldg., Sapulpa, Oklahoma.

Residence.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Oklahoma City.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1 1938, to Dec. 31, 1938.
3. Character of assessment or tax. Income Tax.
4. Amount of assessment, $7,992.59; dates of payment 1939 $1,193.25; 1940 $158.53 & 3-8-41 $6,640.81.
5. Date stamps were purchased from the Government.
6. Amount to be refunded $1,053.49
7. Amount to be abated (not applicable to income or estate taxes) ..... $.....

5 8. The time within which this claim may be legally filed expires, under Section 3313 of the Internal Revenue Code of 19.. on March 8, 1945.

The deponent verily believes that this claim should be allowed for the following reasons:

GEORGE F. COLLINS, JR.,
President.

See statements attached.

Sworn to and subscribed before me this 28th day of March 1944. Catherine Carman, Notary. My comm. expires 5/4/44. (Seal.).

The Liberty Glass Company, Sapulpa, Oklahoma

Statement of Facts Concerning Assessment and Payment of Illegal Taxes for 1938

The Federal income tax return for The Liberty Glass Company for 1938 was filed on or about June 15, 1939 because of an extension of time granted of three months from March 15, 1939.

The return filed on June 15, 1939 showed taxable net income of $9,058.99 and a tax due of $1,193.25. Schedule "B" of the return showed the computation of tax as follows:

Line 12: portion of income not in excess of $5,000.00 at 12%	$625.00
Line 13: portion of income in excess of $5,000.00 at 14%	568.25
	1,193.25

The foregoing computation was correct for corporation showing net incomes of less than $25,000.00.

The tax of $1,193.25 was paid as follows:

6	March 15, 1939 (with tentative return)	$500.00
	June 15, 1939	96.62
	Sept. 15, 1939	298.31
	Dec. 15, 1939	298.32
		1,193.25

In November 1939, Internal Revenue Agent Thomas S. Depew, made an examination of the return for 1938. That report dated November 16, 1939, made the following changes:

Income reported on original return		$9,058.99
Add:		
Novelty sales not reported	$1,212.66	
Less: additional contributions allowable	80.28	
		1,132.38
		10,191.28

As a result of the foregoing an additional tax of $158.53 was assessed and paid.

In November of 1940 a re-examination was made of the 1938 return by Revenue Agent, Carl E. Latta. This report was dated December 26, 1940, and changed the taxable income for 1938 as follows:

Income per previous revenue agents report		$10,191.28
Add:		
Stockholders salaries disallowed	$10,100.00	
Loss on Furnace #2 disallowed	21,934.82	
	32,034.82	
Less—additional contributions allowable	86.62	
		31,948.20
Amended taxable income (2nd examination)		42,139.48

7 Internal Revenue Agent Carl E. Latta in his report computed the income tax as follows:

Amended taxable income	$42,139.48
Tentative tax at 19%	8,006.50
Less:	
2½ of dividend paid of $556.50	13.91
2½% of amounts used to retire indebtedness	Nil
Total tax under general rule	7,992.59

The report and computation of tax failed to allow any credit against the tax of 2½% of sums used to retire indebtedness, yet $75,191.78 was used to retire indebtedness in 1938. To that extent the tax computation was erroneous and illegal and not in accordance with the Internal Revenue Code. The consequence was that an assessment was made of a tax that was in fact not a tax. The amount is 2½% of $42,139.48 or $1,053.49. The amount of refund hereby requested is for $1,053.49 plus legal interest, as a return of an illegal assessment and collection of an amount not in fact a tax. The Revenue Agent made an erroneous and illegal assessment and the amount of $1,053.49 was erroneously, illegally, and wrongfully assessed and collected from The Liberty Glass Company. The Agent failed to recognize that after he had raised the taxable income in excess of $25,000.00 the tax computation was different than for returns made where the income is less than $25,000.00.

The taxpayer paid the additional assessment of tax determined by the Revenue Agent's Report dated December 26, 1940 on March 8, 1941. The amount paid was computed as follows:

Tax per report of December 26, 1940		$7,992.59
Less previously paid:		
Original return	$1,193.25	
1st Revenue Agent's Report	158.53	1,351.78
Additional tax paid		6,840.81

8 Had the tax been correctly computed the additional tax to be paid would have been $5,587.32 as undernoted:

Additional tax paid	$6,640.81
Less error in computation	1,053.49
Amount which should have been assessed	5,587.32

The taxpayer has filed a claim for refund of the same kind of error for the year 1939 of $197.78 and with that claim was submitted details of amounts used to retire indebtedness for the year 1939. The claim has been examined and found correct. The agent making that examination requested, and there was furnished, the information of sums used to retire indebtedness existing as of December 31, 1937.

The taxpayer relies on section 3313 of the Internal Revenue Code, as a basis for recovery of the illegal sum assessed and paid as an income tax, when in fact such sum was neither an income tax nor a just debt of the taxpayer to the Treasury Department of the United States.

The taxpayer further relies upon U. S. v. Lederer Terminal Warehouse Co. C. C. A. 6th District decided November 30, 1943. (1943 P H 62,901). In that case the Court decided that section 3313 properly applies to erroneous or illegal collections. It is contended that the instant illegal collection of a sum erroneously computed by the Internal Revenue Agent as an income tax, when none existed for that sum, from The Liberty Glass Company should now be refunded and recovered, with legal interest.

The amounts used to retire indebtedness in 1938 of $75,191.78 are detailed in appended schedules "1" and "2".

Respectfully submitted.

GEORGE F. COLLINS, Jr.,
President,
THE LIBERTY GLASS COMPANY.

9 SCHEDULE NO. 1.—*The Liberty Glass Company, Sapulpa, Oklahoma*

STATEMENT OF TRANSACTIONS ON INDEBTEDNESS FOR THE YEAR 1938

	Balance Dec. 31, 1937	New borrowing	Payments on indebtedness		Balance Dec. 31, 1938
			Old (1937)	New	
Notes and Trade Acceptances Payable:					
Lynch Corporation	$5,500.00	$47,800.00	$5,500.00	$13,000.00	$34,800.00
Corhart Refractories	5,836.86	9,742.93	5,836.86		9,742.93
Clark Darland	596.82		596.82		
Knope-Coleman	20,000.00		5,000.00		15,000.00
Diamond Alkali	10,000.00	63,688.10	10,000.00	40,000.00	23,688.10
International Business Machines	106.04		106.04		
Hartford Empire Co	577.45		577.45		
Independent Gravel	469.11	4,496.62	469.11	4,496.62	
First National Bank		35,000.00			35,000.00
American National Bank		10,000.00		10,000.00	
Laclede Christy		14,100.93		5,024.72	9,076.21
Other		475.00		475.00	
	43,086.28	185,303.58	28,086.28	72,996.34	127,307.24
Lawrence Warehouse Contracts:					
With American National Bank	19,999.30	44,859.06	19,999.30	25,977.05	18,882.01
With Commerce Trust Company	24,195.00	52,767.55	24,195.00	18,264.47	34,503.08
	44,194.30	97,626.61	44,194.30	44,241.52	53,385.09
Three Rivers Purchase Contract	16,253.40		2,911.20		13,342.20
Grand Total	103,533.98	282,930.19	75,191.78	117,237.86	194,034.53

11 SCHEDULE 2. The Liberty Glass Company, Sapulpa, Oklahoma

Details of Amounts Used to Retire Indebtedness in 1938

Indebtedness incurred prior to December 31, 1937, and in part, retired during the year ended December 31, 1938, as computed hereunder:

Name of creditor—Lynch Corporation		
1 Note dated January 13, 1937		$5,500.00
Note paid in eleven monthly installments of $500.00 each beginning January 13, 1938		5,500.00
Name of Creditor—Corhart Refractories.		
1 Note dated January 1, 1937		5,836.86
Note paid in nine monthly installments of $84.54 each, beginning January 1, 1938		5,836.86
Name of Creditor—Clark-Darland Hardware Co.		596.82
1 Note dated September 20, 1937, payable September 20, 1938		596.82
Note paid September 20, 1938		596.82
Name of Creditor—Knope-Coleman.		
4 Notes dated September 20, 1937 of $5,000.00 each, payable:		
Note #1 September 20, 1938	$5,000.00	
Note #2 September 20, 1939	5,000.00	
Note #3 September 20, 1940	5,000.00	
Note #4 September 20, 1941	5,000.00	
Note #1 paid September 20, 1938 (others paid when due)	5,000.00	
Name of Creditor—Diamond Alkali Company.		
12 2 Notes dated November 15, 1937 of $5,000.00 each payable:		
Note #1 January 14, 1938	$5,000.00	
Note #2 February 13, 1938	5,000.00	
Notes paid when due.		
Name of Creditor—International Business Machine Co.		
1 Note		106.04
Note paid in monthly installments of $53.02 each beginning January 3, 1938		106.04
Name of Creditor—Hartford Empire Co.		
1 Note dated January 2, 1937		577.45
Note paid January 2, 1938		577.45
Name of Creditor—Independent Gravel Co.		
1 Note dated September 10, 1937		469.11
Note paid January 8, 1938		469.11
Name of Creditor—American National Bank, Sapulpa, Oklahoma		
Balance of Note at December 31, 1937, secured by Warehouse Receipts		19,999.30
Note paid on following dates:		
January 1938		7,497.70
February 1938		7,243.20
March 1938		5,258.40
Name of Creditor—Commerce Trust Company, Kansas City, Missouri		
Balance of Note at December 31, 1937, secured by Warehouse Receipts		24,195.00
Note paid on following dates:		
January 1938		1,701.80
February 1938		3,656.40
March 1938		6,940.70
April 1938		6,805.60
May 1938		14,456.25
August 1938		634.25

13 Name of Creditor—Henderson Coquet Receiver for Three Rivers Glass Co

Note dated June 23, 1933, for $44,000.00 due and payable in installments of $242.60 each month on principal plus accrued interest.

Payments on Note:	
Prior to December 31, 1937	27,746.60
In year 1938 (twelve installments of $242.60)	2,911.20
Total paid on indebtedness outstanding December 31, 1937:	
Lynch Corporation	5,500.00
Corhart Refractories	5,836.86
Clark-Darland Hardware Co	596.82
Knope-Coleman	5,000.00
International Business Machines Co	106.04
Hartford Empire Co	577.45
Independent Gravel Co	469.11
American National Bank, Sapulpa	19,999.30
Diamond Alkali Company	10,000.00
Commerce Trust Co	24,195.00
Three River Glass Co	2,911.20
Total	75,191.78

Exhibit B to complaint

Treasury Department

Office of Commissioner of Internal Revenue.
Address Reply to Commissioner of Internal Revenue and

Refer to IT:C1:CC:3-GPM.

Washington 25, June 23, 1944.

The Liberty Glass Company, Collins Building, Sapulpa, Oklahoma.

Gentlemen: Reference is made to your claim for refund
14 of income tax in the amount of $1,053.49 in which you contend that the tax assessed for the year 1938 was erroneously or illegally assessed and under Section 3313 of the Internal Revenue Code, you have four years after payment of such tax within which to file a claim.

Section 3313—period of limitation upon refunds and credits, provides:

"All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty or sum. The amount of the refund (in the case of taxes other than income,

war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

It will be observed that this section specifically exempts from its application income, war-profits, excess profits, estate and gift taxes. The decision in the case of U. S. v. Lederer Terminal Warehouse Company cited by you, is not being followed by the Bureau.

In view of the foregoing, your claim is disallowed and this notice is sent you by registered mail in accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code.

By direction of the Commissioner:

Very truly yours,

NORMAN D. CONN,
Deputy Commissioner.

(File endorsement omitted.)

15 In United States District Court

Answer

Filed March 2, 1945

Comes now the defendant, H. C. Jones, Collector of Internal Revenue for the District of Oklahoma, by his attorney, Charles E. Dierker, United States Attorney for the Western District of Oklahoma, and for his answer to the complaint of the plaintiff herein, admits, denies, and alleges as follows:

1. Admits the allegations contained in the first paragraph of allegations in the complaint.

2. Admits the allegations contained in the second paragraph of allegations in the complaint.

3. Admits the allegations contained in the third paragraph of allegations in the complaint.

4. Admits the allegations contained in the fourth paragraph of allegations in the complaint, except that it is alleged that the payment of $500.00 was made on March 18, 1939 instead of on March 15, 1939.

5. Admits the allegations contained in the fifth paragraph of the complaint.

6. Admits the allegations contained in the sixth paragraph of the complaint.

7. Denies the allegations contained in the seventh paragraph of the complaint, except that it is admitted that in the computation

of the additional tax of $6,640.81, no credit was allowed for amounts asserted to have been used to retire indebtedness.

8. Denies the allegations contained in the eighth paragraph of the complaint.

9. Denies the allegations contained in the ninth paragraph of the complaint, except that it is admitted that the plaintiff paid the tax in the amount of $1,023.49 and that the plaintiff filed a claim for refund as alleged, and that the claim was rejected by the Commissioner, and denies the allegations contained in the claim for refund and attached schedules.

Wherefore, The defendant demands judgment dismiss-
16 ing the complaint, together with the costs and disbursements of the action.

CHARLES E. DIERKER,
United States Attorney,
Attorney for Defendant.

I hereby certify that a copy of the foregoing answer was on this 2nd day of March, 1945 mailed to Earl Foster, First National Bank Bldg., Oklahoma City, Oklahoma, attorney of record for plaintiff.

CHARLES E. DIERKER.

(File endorsement omitted.)

In United States District Court

Defendant's motion to dismiss plaintiff's action

Filed December 4, 1945

Comes now the defendant and moves the Court to dismiss this action for the reason that the complaint herein fails to state a claim upon which any relief can be granted, in that the complaint shows upon its face that the taxpayer filed no timely claim for refund and therefore the complaint fails to state any claim over which this Court would have jurisdiction. Judgment should therefore be for the defendant upon the pleadings.

H C. JONES,
Collector of Internal Revenue,
By CHARLES E. DIERKER,
United States District Attorney,
Attorney for Defendant.

(File endorsement omitted.)

In United States District Court

Stipulation of facts

Filed December 4, 1945

The following facts are stipulated to by plaintiff, The Liberty Glass Company, and defendant, H. C. Jones, Collector of Internal Revenue, to-wit:

(1) That The Liberty Glass Company is a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Sapulpa, Creek County, Oklahoma.

(2) That the defendant is the duly appointed, qualified, and acting Collector of Internal Revenue in the State of Oklahoma.

17 (3) That under the applicable revenue law, the plaintiff was required to file a corporation income and excess profits tax return for the taxable year 1938. That on or about the 15th day of June 1939, plaintiff filed with defendant its corporation income and excess tax return for the year 1939, after having secured an extension of three months from March 15, 1939.

(4) That said tax return showed a taxable net income for the year 1938 in the sum of $9,058.90, with tax due thereon in the sum of $1,193.25; that during the year 1939 plaintiff paid said $1,193.25 in the manner and on the dates as set out in Exhibit "A" attached to the Complaint, except that the payment of $500.00 shown as paid on March 15, 1939, was paid March 18, 1939, which Exhibit "A" is a copy of the claim plaintiff filed with defendant Collector of Internal Revenue, which will be hereinafter referred to.

(5) That in November 1939, Thomas S. Depew, Internal Revenue Agent, made an examination of said 1938 return of this plaintiff above referred to and made a report that the taxable income of the plaintiff for the year 1938 was $10,191.28, which resulted in an additional tax of $158.5[illegible] assessed against plaintiff, and which plaintiff paid.

(6) That in November 1940, a re-examination was made of the 1938 return filed by plaintiff by Carl E. Latta, a revenue agent and his report was dated December 26, 1940, in which report he found that during the year 1938 plaintiff had a taxable net income of $42,139.48 which resulted in an assessment in the sum of $7,992.59, and after deducting the amounts previously paid, as hereinabove set out, left due an additional tax for said year in the sum of $6,640.81, which amount was paid by plaintiff on

March 8, 1941, and that in case judgment shall be rendered for plaintiff that plaintiff be entitled to judgment in the sum of $1,053.49, with interest as provided by law, same being two and a half (2½) per centum of the amount of its net income in the sum of $42,139.48.

(7) That the report and computation of tax made by said Carl E. Latta failed to allow any credit for the money used to retire indebtedness of The Liberty Glass Company, and
18 that said Liberty Glass Company retired indebtedness in the year 1938 in the sum of $75,191.78, which is shown on Schedule 1 and Schedule 2 of Exhibit "A" of plaintiff's Complaint, which retired indebtedness comes within Sec. 13 & 27 of the Revenue Act of 1938, it being agreed that the statements as to the retirement of indebtedness as shown on Schedules 1 and 2 of Exhibit "A" are correct.

(8) That the claim so filed was rejected by the Commissioner of Internal Revenue and refund denied pursuant to a letter signed by Norman D. Conn, under date of June 24, 1944, true and correct copy of said letter being attached to the Complaint as Exhibit "B".

(9) That Exhibit "A" attached to plaintiff's Complaint is a true and correct copy of the Claim duly filed with the defendant Collector of Internal Revenue for the State of Oklahoma on the 30th day of March, 1944.

(10) That the computations made in said Exhibit "A" as to the amount charged and the amounts paid are all correct.

(11) That the above and foregoing constitute all the facts necessary for a proper hearing of this matter; and that the same may be submitted to the court with this Stipulation of Facts and a judgment rendered according to the law governing such cases.

THE LIBERTY GLASS COMPANY,
By EARL FOSTER, *Its Attorney.*
H. C. JONES,
Collector of Internal Revenue.
By CHARLES E. DIERKER,
United States District Attorney and Attorney for Defendant.

(File endorsement omitted.)

In United States District Court

Opinion

Filed April 3, 1946

The Liberty Glass Company, a corporation brings this action against H. C. Jones, Collector of Internal Revenue, seeking to

recover the sum of $1,053.49, with interest from March 8, 1941, for taxes paid by it upon what it claims was an "illegal and erroneous" assessment.

19 The defendant has filed a motion to dismiss for the reason that the complaint "fails to state a claim upon which any relief can be granted, in that the complaint shows upon its face that the taxpayer filed no timely claim for refund and therefore the complaint fails to state any claim over which this court would have jurisdiction."

The parties have filed a stipulation of facts, the pertinent parts of which are as follows:

"(3) That under the applicable revenue law, the plaintiff was required to file a corporation income and excess profits tax return for the taxable year 1938. That on or about the 15th day of June, 1939, plaintiff filed with defendant its corporation income and excess profits tax return for the year 1938, after having secured an extension of three months from March 15, 1939.

"(4) That said tax return showed a taxable net income for the year 1938 in the sum of $9,058.90, with tax due thereon in the sum of $1,193.25; that during the year 1939 plaintiff paid said $1,193.25 in the manner and on the dates as set out in Exhibit 'A' attached to the complaint, except that the payment of $500.00 shown as paid on March 15, 1939, was paid March 18, 1939, which Exhibit 'A' is a copy of the claim plaintiff filed with defendant Collector of Internal Revenue, which will be hereinafter referred to.

"(5) That in November 1939, Thomas S. Depew, Internal Revenue Agent, made an examination of said 1938 return of this plaintiff above referred to and made a report that the taxable income of the plaintiff for the year 1939 was $10,191.28, which resulted in an additional tax of $158.53 assessed against plaintiff, and which plaintiff paid.

"(6) That in November 1940, a re-examination was made of the 1938 return filed by plaintiff by Carl E. Latta, a revenue agent, and his report was dated December 26, 1940, in which report he found that during the year 1938 plaintiff had a taxable net income of $42,139.48, which resulted in an assessment in the sum of $7,992.59, and after deducting the amounts previously paid, as hereinabove set out, left due an additional tax for said year in the sum of $6,640.81, which amount was paid by plaintiff on
20 March 8, 1941, and that in case judgment shall be rendered for plaintiff that plaintiff be entitled to judgment in the sum of $1,053.49, with interest as provided by law, same being two and a half (2½) per centum of the amount of its net income in the sum of $42,139.48.

"(7) That the report and computation of tax made by said Carl

E. Latta failed to allow any credit for the money used to retire indebtedness of The Liberty Glass Company, and that said Liberty Glass Company retired indebtedness in the year 1938 in the sum of $75,191.78, which is shown on Schedule 1 and Schedule 2 of Exhibit 'A' of plaintiff's complaint, which retired indebtedness comes within Sec. 13 & 27 of the Revenue Act of 1938, it being agreed that the statements as to the retirement of indebtedness so shown on Schedules 1 and 2 of Exhibit 'A' are correct.

"(8) That the claim so filed was rejected by the Commissioner of Internal Revenue and refund denied pursuant to a letter signed by Norman D. Conn, under date of June 24, 1944, true and correct copy of said letter being attached to the complaint as Exhibit 'B'.

"(9) That Exhibit 'A' attached to plaintiff's complaint is a true and correct copy of the claim duly filed with the defendant Collector of Internal Revenue for the State of Oklahoma on the 30th day of March, 1944.

"(10) That the computations made in said Exhibit 'A' as to the amount charged and the amounts paid are all correct.

"(11) That the above and foregoing constitute all the facts necessary for a proper hearing of this matter; and that the same may be submitted to the court with this stipulation of facts and a judgment rendered according to the law governing such cases."

It will be observed that in paragraph 6 of the stipulation the tax was paid in a sum found to be due in a rechecking of the original return, which is a sum vastly in excess of the amount paid on the original return. The sum was paid on March 8, 1941, and it is stipulated "that in case judgment shall be rendered for
21 plaintiff that plaintiff be entitled to judgment in the sum of $1,053.49, with interest as provided by law, same being two and a half (2½) per centum of the amount of its net income in the sum of $42,139.48."

Paragraph 7 of the stipulation provides:

"That the report and computation of tax made by said Carl E. Latta failed to allow any credit for the money used to retire indebtedness of The Liberty Glass Company, and that said Liberty Glass Company retired indebtedness in the year 1938 in the sum of $75,191.78, which is shown on Schedule 1 and Schedule 2 of Exhibit 'A' of plaintiff's complaint, which retired indebtedness comes within Sec. 13 and 27 of the Revenue Act of 1938, it being agreed that the statements as to the retirement of indebtedness so shown on Schedules 1 and 2 of Exhibit 'A' are correct."

Paragraph 8 of the stipulation agrees that a claim was filed and was rejected by a letter of June 24, 1944, as shown by exhibit B of the complaint. The basis for the disallowance of the claim was that the statute of limitations had run against the claim.

The claimant contends that it comes within the provisions of Section 3313, Title 26 U. S. C., which is as follows:

"All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sums alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

22 The defendant contends that Title 26 U. S. C. Section 322 subsections (a) (1) and (b) (1), which read as follows, control:

"(A) Authorization (1) Overpayment. Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

(b) Limitation on allowance (1) Period of limitation. Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no refund is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

The interpretation of these statutes is decisive of the motion to dismiss and the judgment to be rendered.

The question as to which of these two statutes controls in such situations as we have here, is not a new one. In the following cases, the courts have had the question under consideration and, as I view the decisions, have in each instance held contrary to the contention advanced by the defendant.

Olsen v. United States, 32 F. Supp. 276 (S. D. Calif., March 19, 1940);

In re Tindle's Estate, 59 F. Supp. 667 (E. D. Penn., March 1, 1945);

Huntley v. Southern Oregon Sales, Inc., 102 2d 538 (C. C. A. 9, March 13, 1939);

United States v. The Lederer Terminal Warehouse Company, 139 F. 2d 679 (C. C. A. 6, Nov. 30, 1943.)

In The Lederer Terminal Warehouse Company Case, supra, the court concluded as follows:

23 "If two statutes present ambiguities, a reasonable interpretation should be adopted by the courts which will give consistent effect to the apparent intention of Congress. Statutes should not be read literally, when such readings leads to absurd results. They should be given 'a reasonable application consistent with their words and with the legislative purpose.' Haggar Company v. Helvering, supra, 308 U. S. 389, 394, 60 S. Ct. 337, 339, 84 L. Ed. 340.

"Congress evidently considered that less time would be required for the discovery of errors in tax returns resultant from *miscalculations* or mere overpayment than would be required to ascertain the *erroneous* or *illegal* nature of an *assessment*. Hence, the inference is logical that Congress intended to allow the taxpayer a longer time to determine whether he had been *erroneously* or *illegally assessed* than would be permitted him for the discovery of a *mere overpayment* of taxes, *assessed* and *collected upon a correct legal basis*. This would explain the longer time limitation provided by Congress in Section 3313 than that allowed in Section 322 of the Internal Revenue Code." (Emphasis supplied.)

It is only when two statutes present ambiguities that courts are concerned with the history of the legislation. If this was not the rule, courts would be engaged in continuous and unending controversies over disagreements as to what the legislators had in mind in framing the language of the statutes. But where the statutes do not present ambiguities, then the intent must be determined by the language of the statutes themselves. As I view these statutes, there is no ambiguity presented here. The purpose each of them is very clear. Section 322 deals with *overpayments* of any tax legally imposed, while Section 3313 deals with claims for credits or refunds claimed to have been paid on sums *alleged, to have been erroneously or illegally assessed or collected, or claims for any sum alleged to have been excessive or in any manner wrongfully collected*. The statute (Section 3313) clarifies its

24 intent by providing these words: "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." Clearly this must refer to Section 322 which provides a period of limitation on claims for *overpayment* on such taxes, of *three years* from the time the taxpayer filed his return or within *two years* from the time the tax was paid. The claim of the plaintiff is for a sum alleged to have been errone-

ously or illegally assessed and clearly is governed by the limitation so provided in Section 3313. To hold otherwise would be contrary to all of the well-considered cases above cited.

The motion to dismiss should be and is hereby overruled and judgment should be rendered for the plaintiff for the sum of $1053.49, with interest at two and a half per centum; as provided by the stipulation, from March 8, 1941.

Form of judgment, consistent with this opinion, may be submitted within ten days from this date.

EDGAR S. VAUGHT,
United States District Judge.

Dated this 3rd day of April 1946.
(File endorsement omitted.)

In United States District Court

Journal Entry of Judgment

Filed April 18, 1946

The above entitled matter came on to be heard before the undersigned judge of the United States District Court for the Western District of Oklahoma on the 4th day of December 1945, plaintiff appearing by its attorney, Earl Foster, and the defendant appearing by Charles E. Dierker, United States District attorney for the Western District of Oklahoma, and John W. Fisher, special assistant to the Attorney General; and both sides having announced ready for trial and having filed with the clerk a Stipulation of Facts, making it unnecessary to introduce oral testimony; and defendant having filed a Motion to Dismiss Complaint for the reason that same failed to state grounds upon which any relief could be granted; and the court having heard the argument of counsel; and defendant having requested that the court permit the filing of written briefs, which request was granted by the court, plaintiff was given until the 15th day of January 1946, within which to file its brief, and the defendant twenty days thereafter to answer;

Whereupon both sides having filed briefs pursuant thereto, and plaintiff having filed a supplemental brief; and the court having considered said briefs, on the 3rd day of April, 1946, filed with the clerk an opinion setting out his Findings of Fact and Conclusions of Law, finding that said Motion to Dismiss should be overruled, and that judgment should be rendered by the court for plaintiff, as prayed for in said Complaint;

It is Therefore Ordered, Adjudged, and Decreed by the Court that the Motion to Dismiss filed by the defendant herein be, and

the same is hereby, overruled, and that plaintiff be, and it is hereby, granted a judgment in the sum of One Thousand Fifty-three and 49/100 Dollars ($1,053.49), with interest as provided by law from March 8, 1941, and the costs of this action.

Dated this 18th day of April, 1946.

EDGAR S. VAUGHT,
Judge of the United States District Court for the Western District of Oklahoma.

(File endorsement omitted.)

In United States District Court

Notice of Appeal

Filed July 17, 1946

Notice is hereby given that H. C. Jones, Collector of Internal Revenue, defendant above named, hereby appeals to the Circuit Court of Appeals of the Tenth Circuit from the final judgment entered in this action on April 18, 1946, in favor of the
26 plaintiff-appellee, The Liberty Glass Company, and against the defendant-appellant H. C. Jones, Collector of Internal Revenue.

CHARLES E. DIERKER,
United States Attorney for the Western District of Oklahoma, Attorney for Appellant, H. C. Jones, Collector of Internal Revenue.

Copy of the above notice of appeal mailed Mr. Earl Foster, Atty., 1st Natl. Bldg., Okla. City, July 17, 1946. Margaret P. Blair, Deputy Clerk.

(File endorsement omitted.)

In United States District Court

Appellant's designation of contents of record on appeal

Filed July 19, 1946

The appellant in the above-entitled cause hereby designates the parts of the record to be contained in the record on this appeal, as follows:

1. Plaintiff's complaint.
2. Defendant's answer.

3. Defendant's motion to dismiss plaintiff's action.
4. Stipulation of facts.
5. Opinion.
6. Judgment.
7. Notice of appeal.
8. This designation.
9. Statement of points on which appellant intends to rely.

CHARLES E. DIERKER,
United States Attorney, Attorney for the Defendant.

I hereby certify that a copy of the foregoing Designation of Contents of Record on Appeal was on this 19th day of July, 1946, deposited in the United States Post Office at Oklahoma City, Oklahoma, in an official franked envelope addressed to Mr.
27 Earl Foster, Attorney at Law, State Capitol Bldg., Oklahoma City, Oklahoma, attorney of record for appellee.

CHARLES E. DIERKER,
United States Attorney.

(File endorsement omitted.)

In United States District Court

Statement of points on which appellant intends to rely

Filed July 19, 1946

The points on which appellant intends to rely on this appeal are as follows:

1. The District Court erred in holding that plaintiff's claim for refund is governed by the four year limitation provided in Section 3313 of the Internal Revenue Code instead of the two year limitation provided in Section 322 (b) (1) of the Internal Revenue Code.
2. The District Court erred in overruling the defendant's motion to dismiss the action.
3. The District Court erred in entering judgment for the plaintiff, and in failing to enter judgment for the defendant.

CHARLES E. DIERKER,
United States Attorney, Attorney for the Defendant.

I hereby certify that a copy of the foregoing Statement of Points Upon Which Appellant Intends to Rely was on this 19th day of July, 1946, deposited in the United States Post Office at Oklahoma City, Oklahoma, in an official franked envelope addressed to Mr.

Earl Foster, Attorney at Law, State Capitol Building, Oklahoma City, Oklahoma, attorney of record for appellee.

CHARLES E. DIERKER,
United States Attorney.

(File endorsement omitted.)

28 (Clerk's certificate to foregoing transcript omitted in printing.)

29 In United States Circuit Court of Appeals,
Tenth Circuit

Record entry: Cause argued and submitted

Fourth Day, November Term, Thursday, November 14th, A. D. 1946

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN, Circuit Judges

This cause came on to be heard, and was argued by counsel. S. Walter Shine, Esquire, appearing for appellant. Earl Foster, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

In United States Circuit Court of Appeals

S. Walter Shine, Special Assistant to the Attorney General (Sewall Key, Acting Assistant Attorney General, J. Louis Monarch and Frank J. Ready, Special Assistants to the Attorney General, and Charles E. Dierker, United States Attorney, were with him on the brief), for Appellant.

Earl Foster for Appellee.

Before PHILLIPS, BRATTON, and HUXMAN, Circuit Judges

Opinion

January 21, 1947

BRATTON, Circuit Judge: The Liberty Glass Company, a corporation, hereinafter referred to as the taxpayer, instituted this action against the Collector of Internal Revenue for the District of Oklahoma, hereinafter referred to as the collector, to recover the sum of $1,053.49, with interest, on the ground that it had been paid as income and excess-profits taxes pursuant to an erroneous and illegal deficiency assessment. The cause was submitted to the court on stipulated facts. It was stipulated that the taxpayer filed its return for the year 1938 and seasonably paid the taxes

shown therein; that two separate examinations were subsequently made of the return, each resulting in a deficiency assessment which was paid; that the last assessment failed to allow any credit for money used by the taxpayer during the taxable year to retire indebtedness; that such assessment was paid on March 8, 1941; that claim for refund was filed on March 30, 1944; and that the claim was rejected on the ground that it was not filed within the time required by law. It was further stipulated that if the taxpayer was entitled to recover, the judgment should be for $1,053.49, with interest. The court entered judgment for the taxpayer, and the collector appealed.

The question presented is whether it was necessary that the claim be filed within two years after payment, as required by section 322 of the Internal Revenue Code, 26 U. S. C. A. § 322; or within four years after the payment, as required by section 3313 of the Code, 26 U. S. C. A. § 3313. If the former, it was filed too late; if the latter, it was within time. Section 322 provides in material part that in case of an overpayment of any tax imposed by the chapter, the amount of such overpayment shall be credited against any income, war-profits or excess-profits tax then due from the taxpayer, that any balance shall be refunded to the taxpayer; and that a claim for the credit or refund must be filed within three years after the filing of the return or within two years after payment of the tax. Section 3313 provides in material part that all claims for the crediting or refunding of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, must be presented to the Commissioner within four years after payment of the tax.

By its express terms, section 322 has application to claims for overpayment of income, war-profits, or excess-profits taxes. It was intended to govern overpayments resulting from errors occurring in the preparation of the return, or in other somewhat similar circumstances. And by its express language, section 3313 has application to claims for the crediting or refunding of payments of internal revenue erroneously or illegally assessed. It was intended to govern where a deficiency assessment is erroneously or illegally made under pretended color of legal authority. The claim submitted by this taxpayer was not for a refund of an overpayment arising out of an error or mistake in the preparation of the return. Nothing of that kind entered into the situation. It was for money paid in liquidation of a deficiency assessment erroneously and illegally made under pretended color of legal authority. Therefore the time for the filing of the claim was fixed by section 3313. Huntley v. Southern Oregon Sales, Inc.,

102 F. (2d) 538; United States v. The Lederer Terminal Warehouse Co., 139 F. (2d) 669; Pennsylvania Co. v. United States, 152 F. (2d) 757, affirming 59 F. Supp. 667. See also Olsen v. United States, 32 F. Supp. 276; Godfrey v. United States, 61 F. Supp. 240; Noble v. Kavanagh, 66 F. Supp. 258.

Conceding that the cases just cited are against his contention and expressly challenging their correctness, it is the argument of the collector that by the exceptive provision contained in section 3313 a claim of this kind is excluded from that section, and that the time for the filing of such a claim is governed by section 322. Strong reliance is placed upon the legislative history of the two sections to sustain the contention. One rule for the construction of statutes is that where doubt exists as to the meaning of words used in a statute, the legislative history may be taken into consideration in resolving the doubt. Fairport, Painesville & Eastern Railroad Co. v. Meredith, 292 U. S. 589; United States v. Dickerson, 310 U. S. 554. But that is only one rule, and it may be invoked only in case of doubt, ambiguity, or uncertainty in respect of the meaning of the language used. And the plain meaning of a statute cannot be overcome by resort to the legislative history leading up to its enactment. Gemsco, Inc. v. Walling, 324 U. S. 244. There is no need to detail the extended legislative history on which the collector relies. It is enough to say that we have examined it with care and we do not think it necessarily supports the contention; and further, that it falls short of overcoming the fairly plain language used in the two sections of the statute.

Another well recognized rule lends its strength to the conclusion that the time for the filing of a claim of this kind is governed by section 3313, not section 322. The case of Huntley v. Southern Oregon Sales, Inc., supra, was decided almost eight years ago, and the later cases citing it with approval and reaching the same conclusion followed. During that period Congress convened from time to time, has enacted revenue legislation, and by section 5 of the Act of July 31, 1945, 59 Stat. 511, 523, has amended section 322, all without indicating in any manner its disapproval of the judicial interpretation placed upon the two sections. That in composite effect should be regarded as Congressional approval and adoption of the interpretation placed by the courts upon the two statutes. Sessions v. Romadka, 145 U. S. 29; Manhattan Properties, Inc. v. Irving Trust Co., 291 U. S. 320; United States v. Elgin, Joliet & Eastern Railway Co., 298 U. S. 492; Missouri v. Ross, 299 U. S. 72; Electric Storage Battery Co. v. Shimadzu, 307 U. S. 5. True, none of the cases construing the two sections was by the Supreme Court of the United States, but the rule of uniform judicial construction of a statute over a long period of

time being regarded as acceptable to the legislative arm of the government has appropriate application where legislation dealing with the general subject matter has been enacted and the particular statute has been amended, without any action or expression indicating legislative disapproval of the judicial construction, even though the construction was by circuit courts of appeal and district courts of the United States. Manhattan Properties, Inc. v. Irving Trust Co., supra.

The judgment is affirmed.

Dissenting opinion

32 HUXMAN, Circuit Judge, dissenting: I find myself unable to agree with the conclusions of my associates. I find much more difficulty in concluding than does the majority that the language of Section 322[1] clearly limits its application to so-called overpayments of income, war profits, or excess profits taxes, and that the language in Sec. 3313 clearly indicates that it governs all other applications for refunds of all internal revenue taxes, including income taxes other than so-called technical overpayments.

Sec. 3313 providing for the recovery of internal revenue taxes wrongfully collected has been a part of the Internal Revenue Code since 1872. See 17 Stat. 257. This section is Sec. 3228 of the Revised Statutes. The section sets up the procedure for filing claims for the recovery of amounts unlawfully exacted as internal revenue taxes. Almost from the beginning of the Federal Income Tax Law, the part of the revenue law providing therefor has likewise contained a section providing for the recovery of income taxes wrongfully collected. Every such section evidences a Congressional intent to remove the proceedings for the recovery of such taxes from the provisions of Sec. 3228 and regulate the right to recovery thereof by the applicable section of the income tax law. Thus, Sec. 14 (a) of the 1916 Revenue Act, providing for the right of recovery of such taxes, provides that the taxpayer "* * * shall be permitted to present a claim for refund thereof notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes; * * *." So Section 252 of the 1918 Act provides for the recovery of such taxes "* * * notwithstanding the provisions of section 3228 of the Revised Statutes, * * *." Sec. 252 of the 1921 Revenue Act contains this language: "Notwithstanding any other provisions of law, * * *".

Sec. 1316 of the 1921 Revenue Act amended Sec. 3228 by changing the period of limitation from five years to four years, and

[1] Sec. 322 is for all purposes the same as former Sec. 252. In this opinion reference will be made to Sec. 252.

made the amendment retroactive to all claims for refunds under the 1916, 1917, and 1918 Revenue Acts, with the exception that the amended act was not made applicable to income taxes. It contains this significant language: "This section, *except as modified by Section 252*, shall apply retroactively * * *."[2] Here is a clear recognition that the right to a refund of income taxes is controlled by Sec. 252.

Section 281 (a) of the Revenue Act of 1924 dealt with "overpayment" of income taxes. Section 281 (b) fixed the period within which claims for refunds must be filed. Section 1912 of the same act again amended Sec. 3228. The language of this amended section is significant. It speaks of "All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * *." It then provides that all such claims "* * * except as provided in Section 281 [which relates to income tax] * * *" must be presented. It would seem that when this section legislates with regard to all claims for taxes collected, whether erroneously assessed or collected, and then excepts from its provisions income taxes because they are provided for in Sec. 281, the exceptions being general, it meant that claims for refunds of income taxes, whether illegally assessed or collected, were provided for in Sec. 281. Construing these two sections together, it would seem logical to conclude that the word "overpayment" was used in its broad sense as meaning a payment of more than was due no matter for what cause, rather than in its narrow sense of a payment of more than was due by virtue of an error on the part of the taxpayer in filing his return.

Sec. 3228 was further amended in the Revenue Act of 1926, but again there was excepted from its provisions claims "* * * as provided in sections 284 [income tax] and 319 [estate tax] * * *"

The Act of 1928 again amended Sec. 3228 with regard to the procedure for the filing of claims for refunds of internal revenue taxes, and again it excepted from its provisions refunds for income and kindred tax payments. The language in the exception clause of the 1926 Revenue Act (except as provided in Section 284 (income tax) and 319 (estate tax)), was changed to read: "Except as otherwise provided by law in the case of income, war profits, excess profits, estate, and gift taxes." This exception no doubt was made in this form because these additional taxes had come into existence in the meantime.

It appears to me that the natural and logical conclusion to be drawn from all of this is that throughout all this time Congress

[2] Emphasis supplied.

considered and understood that claims for refunds for income, war profits, excess profits, estate and gift taxes, were especially provided for in particular sections of the revenue laws, and therefore were excluded from the provisions of Section 3228, rather than to interpret the language as though it read in substance as follows: "Except in the case of overpayment of income, war profits, excess profits, estate and gift taxes, which overpayments are provided for in Section 252."

The word "overpayment" is not a word of art, but a word having a general meaning. In general, payment may be defined as a satisfaction of an obligation by the delivery of or transfer of that which is due. So, overpayment may be defined as a payment or delivery of more than is due. Whether the payment results from an error on the part of a taxpayer in making and filing his
34 return or from erroneous assessments by the Collector when made, it is an overpayment or a payment of more than is due. Considering the language in the various Congressional enactments relating to Section 252 and 3228, it appears to me that this is the sense in which Congress used the word; that it intended that the refund of all taxes mentioned in Sec. 252 should be controlled by Sec. 252, and the refund of all other internal revenue taxes should continue to be controlled by Sec. 3228, which had been a part of the general revenue laws since 1872.

The income tax law put into force a new class of internal revenue taxes. The Revenue Act of 1921 is a general act having fourteen subtitles, relating to the collection of all internal revenue taxes. The first twelve subtitles deal with specific classes of internal revenue. It is worthy of note that of all of these, only subtitle 2, dealing with income taxes, is complete in itself. The entire Revenue Act of 1921, except subtitle 2, could be repealed and we would still have a complete statute for the assessment, levy, and collection of income taxes, including a provision for refund of amounts collected in excess of what was due. If the income tax sections of the Revenue Act of 1921 constituted a separate statute, I would have no difficulty in construing Section 252 as authorizing a refund on all amounts improperly collected.

The Treasury Department understood and construed Section 252 as controlling the refund of all amounts collected in excess of what is due. That is clearly demonstrated by the letter of Secretary Mellon to the Chairman of the House Ways and Means Committee at the time amendment of Section 252 by the Revenue Act of 1923 was before the Committee. The difficulty with Section 252, as shown by the Secretary's letter, was that it required a claim for a refund to be filed within five years from the date of the return. As the Secretary pointed out, in those cases where the final determination of an additional assessment was not made for more than

five years after the filing of the report, no claim for a refund could be filed therefor. To correct this, the Department had entertained claims for refunds for income taxes erroneously or illegally assessed if the claims were filed within the time fixed in Section 3228. The Secretary stated that the legality of this procedure was doubted by the Department. In other words, they were of the opinion that all such claims were properly to be filed under Section 252 but to afford the taxpayer relief they had entertained them if filed within the time provided for in Section 3228. The House Committee's report stated that the effect of the amendment to Section 252 was clearly shown by the Secretary's letter, and that the Committee concurred in the suggestion of the Secretary as to the need of making the law definite so a taxpayer who had by agreement with the Treasury permitted the time for the final assessment of taxes due from him to be made after the expiration of the five year period (in Section 252) will not be barred from making a claim for refund when the assessment is made and the taxpayer alleges that the assessment is illegal. This language can mean only that Congress understood that claims for the refund of income taxes illegally assessed were properly filed under Section 252. They were speaking of illegal assessments, not of technical overpayments, and were attempting to safeguard a taxpayer's right to recover them under Section 252. If Section 252 related only to so-called overpayments, then all this talk of amending the section to provide for claims for illegal assessments was out of place. This clearly indicates that not only the Treasury Department, but also the House and Senate, construed Section 252 as controlling applications for the refund of all income taxes.

In view of this, I cannot concur in an opinion that bases the decision largely on the tenuous ground that Congress having failed to amend Section 252 since the Huntley decision,[3] we must presume that its interpretation expresses the Congressional intent. The interpretation in the Huntley case is diametrically opposed to the interpretation as contained in Secretary Mellon's letter in which the Ways and Means Committee of Congress expressly concurred.

The principle of Congressional approval of judicial interpretation of its acts by failure to take further action has a place in the judicial process. But its application is not absolute and requires the exercise of sound discretion. It is founded on the principle that Congress has knowledge of these decisions, and, having such knowledge and failing to take further steps in the matter, we may presume that it concurs in such interpretation. Whether it can be said that Congress has knowledge of the decision depends upon many factors, such as the universality with which

[3] Huntley v. Southern Oregon Sales, 104 F. 2d 153.

the principle has been declared, the period of time involved, the general public interest in the particular subject, as well as the court which has decided the matter. Thus, a decision by the Supreme Court is much more likely to come to the attention of Congress than a decision by a lower court.

The Huntley opinion is the only one that has attempted an exhaustive analysis of Sections 252 and 3228. The few remaining decisions largely follow the Huntley case. It might be slightly violent to presume that any Circuit Judge had knowledge of all the decisions of the Circuit Courts dealing with various principles of law. It is much more difficult for me to presume that the Huntley decision, which is approximately eight years old and which relates to a minor detail in the administration of the income tax law, came to the attention of Congress than that it was
36 known to all the Circuit Judges, especially so since during all that time Congress was occupied with matters of greatest importance to our national existence.

For these reasons, I must respectfully dissent.

In United States Circuit Court of Appeals

Judgment

Forty-fifth Day, November Term. Tuesday, January 21st, A. D. 1947

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On February 26, 1947, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

(Clerk's certificate to foregoing transcript omitted in printing.)

37 SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed June 2, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

APR 15 1947

No. 1265

In the Supreme Court of the United States

OCTOBER TERM, 1946

H. C. JONES, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

THE LIBERTY GLASS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1265

H. C. JONES, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

THE LIBERTY GLASS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Acting Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered January 21, 1947, affirming the judgment of the District Court for the Western District of Oklahoma.

OPINIONS BELOW

The opinion of the District Court (R. 18–24) is reported in 66 F. Supp. 254. The opinions in the Circuit Court of Appeals (R. 29–36) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 21, 1947. (R. 36.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether claims for refund of income taxes must be filed within two years after the payment of the tax, as provided by Section 322 (b) of the Internal Revenue Code, or within four years after the payment of the tax, as provided by Section 3313 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment, shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within

two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U. S. C. 322.)

SEC. 3313. PERIOD OF LIMITATION UPON REFUNDS FOR CREDITS.

All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years

immediately preceding the allowance of the refund.[1] (26 U. S. C. 3313.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.322–7. LIMITATIONS UPON THE CREDITING AND REFUNDING OF TAXES PAID.—(a) *General rule.*—Unless a claim for credit or refund of an overpayment is filed within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, the Commissioner is prohibited from allowing or making a credit or refund of income tax imposed by chapter 1 for such year after both periods have expired.[2] * * *

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[1] The taxes here involved are income taxes for the taxable year 1938. Income taxes for taxable years beginning prior to January 1, 1939, remain subject to the statutory provisions in effect prior to the Code. Section 1 of the Internal Revenue Code (26 U. S. C. 1). However, Section 322 (b) of the Revenue Act of 1938, and Section 3228 (a) of the Revised Statutes as it read in 1938 are the same as Section 322 (b) and Section 3313 of the Code, and there is no material difference in the statutory situation in effect in 1938 and under the Code so far as the argument here made is concerned. Moreover, the taxpayer relied upon Section 3313 of the Code in its claim for refund and has continued to rely upon it. In view of all this, it is believed that confusion is avoided and ease of reference facilitated by discussing Section 322 (b) and Section 3313 of the Code as the statutes involved.

[2] Insofar as pertinent Section 19.322–7, as amended by T. D. 5256, 1943 Cum. Bull. 550, Regulations 103, promulgated under the Internal Revenue Code, and Article 322–7, Regulations 101, promulgated under the Revenue Act of 1938, are similar to the foregoing provisions.

STATEMENT

The facts shown by the pleadings (R. 1–16), and the stipulation of facts (R. 16–18) were found by the District Court (R. 19–21) and may be summarized as follows:

The taxpayer is an Oklahoma corporation doing business in Oklahoma. (R. 16.) After having obtained an extension of time, the taxpayer on June 15, 1939, filed its corporation income and excess profits tax return for the calendar year 1938, which disclosed a taxable net income of $9,058.90 and indicated a total liability of $1,193.25, which amount was duly paid in 1939. (R. 17.) An additional assessment of $158.53 was also paid in 1939. (R. 17.) Neither the original tax nor the additional tax mentioned is involved in this action.

Subsequent to the filing of the return and the first additional assessment, an investigation of the taxpayer's income tax liability was made by a revenue agent, and this resulted in the assessment of additional tax in the amount of $7,992.59, and of this amount, after it was reduced for amounts previously paid, $6,640.81 remained due and was paid on March 8, 1941. (R. 17.) In the computation of this additional tax, certain adjustments were made, to none of which the taxpayer takes exception in this case. (R. 5–13, 17–18.)

On March 30, 1944, the taxpayer filed a claim for refund of $1,053.49, on the ground that during the year 1938, the taxpayer paid sums aggregating $75,191.78 on indebtedness of the corporation within the meaning of Section 27 (a) (4) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and that the taxpayer was entitled to credit for such payments in an amount equal to two and one-half percent of its adjusted net income, or $1,053.49, and that failure to allow such credits was erroneous. (R. 5–13, 18.) The taxpayer stated in the claim that it was relying on the four-year limitation period provided in Section 3313 of the Internal Revenue Code. (R. 5–13.) The claim was rejected by the Commissioner of Internal Revenue under date of June 23, 1944, by a letter in which it was pointed out that Section 3313 of the Code specifically exempts from its application income, war-profits, excess profits, estate and gift taxes. (R. 13–14, 18.)

It was expressly stipulated that under the applicable revenue law, the taxpayer was required to file a corporation income and excess profits tax return for the taxable year 1938. (R. 17.)

On December 4, 1945, the Collector filed a motion to dismiss the complaint and for judgment on the pleadings (R. 16), which was overruled by the District Court on April 3, 1946 (R. 24), judgment entered on April 18, 1946 (R. 24–25), and the Circuit Court of Appeals for the Tenth

Circuit affirmed (R. 29–31) with Judge Huxman dissenting. (R. 32–36.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that claims for refunds of erroneous assessments of income taxes are governed by the limitation provisions of Section 3313 of the Internal Revenue Code.

2. In holding that Section 322 (b) of the Internal Revenue Code is not applicable to refund claims based on erroneous assessments of income taxes.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The court below has decided a question of general importance arising under the federal revenue laws which should be finally determined by this Court. The importance of the question presented, involving, as it does, the great mass of claims for refund of income taxes, is manifest.

The holding below that a four-year period rather than a two-year period of limitation applies in cases of this character greatly impairs the value to the Government of the statute of limitations which this Court recently characterized as "an almost indispensable element of fairness as well as of practical administration of an income tax policy." *Rothensies* v. *Electric Stor-*

age Battery Co., No. 48, this Term, decided December 16, 1946, slip sheet, p. 4. Cases dependent on the answer are now pending in the Court of Claims and in District Courts in all the circuits except the Fourth and Eighth, and the problem is an ever-recurring one.[3] A decision of this Court on the question at this time will prevent much useless litigation, as many more cases will undoubtedly arise.

2. The decision is plainly incorrect and inconsistent with the intent of Congress as disclosed by the two sections and their legislative history. Section 3313 of the Internal Revenue Code expressly provides that the limitation provisions of that section are intended to govern claims for refund of all taxes "*except* as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." Section 322 (b), on the other hand, expressly provides the limitation period for filing claims for refund of income, war-profits and excess profits taxes.[4] The court below nevertheless held that the four-year limitation applies to this case.

The decision rests upon the fact that Section

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[3] These cases involve approximately $200,000. This sum, however, is no measure of the amount of refunds that would have to be made if this decision is permitted to stand, because of the recurring nature of this question.

[4] Section 910 and Section 1027 of the Internal Revenue Code govern estate and gift taxes, respectively.

322 (a) uses the word "overpayment" and upon a supposed distinction between an "overpayment" of tax, which is supposed to result from errors occurring in the preparation of the return, and an "erroneous or illegal assessment or collection" made under color of legal authority. As a result of this construction Section 322 was held inapplicable to claims for refund of income taxes alleged to have been erroneously assessed and collected. Since Section 3313 establishes a four-year period after the payment of tax, whereas Section 322 fixes a two-year period, the claim filed in this case (more than two but less than four years after payment of the tax) was held to be timely.

The decision thus reads into the sections an ambiguity which is not in any way justified by the language used. There is nothing in the word "overpayment" which excludes from its meaning an overpayment made because the tax was erroneously or illegally assessed. The reason for the inclusion in the Internal Revenue Code of more than one section establishing limitations on the filing of refund claims is made necessary not by the distinction drawn by the court below but by the separate treatment provided throughout the Code for income, profits, estate and gift taxes as distinguished from those known as "Miscellaneous" and "Excise, Import, and Temporary" taxes. (See Subtitle B, Internal Revenue Code, Chapters 6–28, and Subtitle C, Internal Revenue Code,

Chapters 29–33.)[5] Such separate treatment is based upon broad considerations of legislative and administrative convenience and necessity, and is interwoven with the elaborate but separate growth of these various kinds of taxes. On this point we believe that the arguments made by Judge Huxman in his dissenting opinion below are persuasive and should have been accepted by the court below. (R. 34–35)

The decision below is also contrary to clear evidence of Congress' understanding of these sections as far back as 1923. The then Secretary of the Treasury in a detailed letter addressed to the Chairman of the House Ways and Means Committee (Appendix, *infra*) asked that the forerunner of Section 322 (Section 252 of the Revenue Act of 1921, c. 136, 42 Stat. 227) be amended so that the period of limitations for filing claims for refund of *erroneous or illegal assessments of income taxes* would commence when the tax was paid and not only, as the section then provided,

[5] Examples of such separate treatment for income, profits, gift and estate taxes may be found in the following sections of the Code: Sections 322, 871 and 1012 conferring jurisdiction in the Tax Court over such taxes; Section 3777 providing for review by the Joint Committee on Internal Revenue Taxation of refunds authorized in excess of $75,000; Section 3801, providing for certain mitigation of the statute of limitations in income tax cases; Section 3804 (1) (A), (B) and (C), extending the time for filing returns, making payment, or filing Tax Court petitions in respect of such taxes; Section 3807, extending the period of limitations for income and profits taxes.

on the date the return was due. The amendment, thus modifying the *income tax section*, was duly enacted.[6]

If the forerunner of Section 3313 (Section 3228 (a), Revised Statutes) were applicable to erroneous assessments there would have been no need for such an amendment since in the latter section the period of limitations did commence on the date the tax was paid. The explanatory letter of the Secretary of the Treasury was embodied in the House Committee Report[7] as its explanation of the need for the amendment of the income tax section, and the Senate Finance Committee adopted the House Report as its own.[8] It is submitted that this evidence of the understanding of the Congress and the Treasury is well-nigh conclusive.[9] The majority opinion below, without analysis, simply held that they "do not think it [the legislative history] necessarily supports the contention" of the Government. (R. 31.)[10]

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[6] Act of March 4, 1923, c. 276, 42 Stat. 1504.

[7] H. Rep. No. 1424, 67th Cong., 4th Sess., p. 2 (1939-1 Cum. Bull. (Part 2) 848, 849–850).

[8] S. Rep. No. 1137, 67th Cong., 4th Sess., p. 1 (1939-1 Cum. Bull. (Part 2) 848).

[9] Additional evidence of the understanding of the draftsmen of the Revenue Act of 1924, to the same effect, is found in the statement of Dr. Gregg. Statement of the Changes Made in the Revenue Act of 1924 by H. R. 6715 and the Reasons Therefor, Senate Committee Print, 68th Cong., 1st Sess., March 6, 1924, p. 37.

[10] The court relies in part on *Huntley* v. *Southern Oregon Sales*, 102 F. 2d 538 (C. C. A. 9th), which, after detailing

3. The decision here overturns a long established administrative practice which, until comparatively recently, had not been challenged. In many cases the controlling effect of Section 322 (b) was assumed without question. See, e. g., *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *Garbutt Oil Co.* v. *United States*, 89 F. 2d 749 (C. C. A. 9th); *United States* v. *Bibb Mfg. Co.*, 73 F. 2d 367 (C. C. A. 5th); *Pelham Hall Co.* v. *Carney*,

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the legislative history (*except* for the Reports on the 1923 amendment and the 1924 Statement which were not called to its attention by the Government's brief) concluded there was nothing therein to assist in resolving the apparent conflict between the two sections, and rationalized a distinction based upon those who are required to file returns and those who are wholly exempt. As to the latter, it was thought that taxes assessed and collected were erroneous and illegal. Although the decision was believed to be erroneous, certiorari was not requested in the absence of a conflict and because the problem had not assumed general importance at the time. *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679 (C. C. A. 6th), also held in favor of a taxpayer, and although citing *Southern Oregon* disregarded the rationale of that case and held that Section 3313 governed taxpayers, whether required to file returns or not, whose income taxes were erroneously collected. For the same reasons as in the *Southern Oregon* case, the Government did not apply for certiorari. *Kavanagh* v. *Noble* (C. C. A. 6th), decided February 11, 1947, held the *Lederer* case to be controlling. Certiorari is being applied for simultaneously with the present application. *In re Tindle's Estate*, 59 F. Supp. 667 (E. D. Pa.) affirmed *per curiam sub nom. Pennsylvania Co. etc.* v. *United States*, 152 F. 2d 757 (C. C. A. 3d), turned on another issue, and on the question here presented, since it involved estate taxes, is so patently wrong as to be wholly unreliable as a precedent. *Central Hanover Bank & Trust Co.* v. *United States*, 67 F. Supp. 920 (S. D. N. Y.), supports the Government's position.

111 F. 2d 944 (C. C. A. 1st); *Cf. United States* v. *Frauenthal*, 138 F. 2d 188 (C. C. A. 8th); *Rosenman* v. *United States*, 323 U. S. 658. *Huntley* v. *Southern Oregon Sales*, 102 F. 2d 538 (C. C. A. 9th), the first case in which the question was raised, was not decided until 1939 and was thought to be of narrow application. *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679 (C. C. A. 6th), was decided in November 1943. See footnote 10.

The Treasury Regulations issued under every Revenue Act since 1924 have contained only one article dealing with time limits on claims for refund of income taxes and have provided that they be filed within the time prescribed in Section 322 (b), or its predecessors. The language of Regulations 111, Section 29.322–7, quoted *supra*, is found in almost identical terms in all income tax regulations since Regulations 94, promulgated under the Revenue Act of 1936.[11] This administrative interpretation[12] has been unwavering.

[11] Section 19.322–7 of Regulations 103 (1939), Article 322–7 of Regulations 101 (1938) and Regulations 94 (1936); *Cf.* Article 322–7 of Regulations 86 (1934), Article 1257 of Regulations 77 (1932) and Regulations 74 (1928), Article 1305 of Regulations 69 (1926), and Article 1307 of Regulations 65 (1924).

[12] See, for example, Treasury Form 843 (Revised April 1940), on which all claims for refund of income and other taxes must be filed. This form requires the Collector to indicate which one of the three types of claims the taxpayer has filed: (1) Refund of Tax Illegally Collected, (2) Refund of Amount Paid for Stamps Unused, or Used in Error or Ex-

Yet, without mention or discussion of this factor, the opinion below decides the question directly contrary to this long standing administrative practice.

4. The effect of the decision below is to cast serious doubt upon the right of the Commissioner of Internal Revenue to pay interest on refunds of income taxes erroneously assessed or collected. The only statutory provision which permits the payment of interest on refunds is Section 3771 (a) of the Internal Revenue Code, which provides that—

> Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

If it is true that overpayments of taxes are different from erroneous or illegal collections of taxes, then there is no authority to be found anywhere in the Internal Revenue Code permitting the payment of interest on the refund of the latter types of collections.[13] Not only does the result appear to be the reverse of what would be expected, but it is contrary to the unchanged administrative practice. Interest has always

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cess, and (3) Abatement of Tax Assessed (not applicable to estate or income taxes). There is no place to designate so-called "overpayments."

[13] *Rosenman* v. *United States*, 323 U. S. 658, 663: "Exaction of interest from the Government requires statutory authority * * *." *Cf. Huntley* v. *Southern Oregon Sales*, 104 F. 2d 153 (C. C. A. 9th).

been paid on all refunds, regardless of what caused the payment of such sum by the taxpayer in the first instance. And "it will not do to treat the same transaction as [over]payment and not as [over] payment, whichever favors" the taxpayer. *Cf. Rosenman* v. *United States, supra,* p. 663.

5. Perhaps an even more important result of the distinction drawn by the court below would be in the limitation it would impose upon the jurisdiction of the Tax Court. In any case where a deficiency in income taxes has been determined and the taxpayer has filed a petition for review, subsection (d) of the very section here in question (Section 322) gives jurisdiction to the Tax Court to find that a taxpayer "has made an overpayment of tax." The result of the decision below is to limit the Tax Court's jurisdiction to make such findings to only those cases where the excessive payment results from an error made on the return. No jurisdiction would exist in the harsher situation, one which more obviously calls for relief to the taxpayer, where the payment of the tax arose from the Commissioner's erroneous or illegal assessment. Such a serious limitation upon the jurisdiction of the Tax Court could only be justified on the basis of a statutory command in the most express language. Yet all available evidence of the legislative intent clearly points to a contrary result.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

APRIL 1947.

APPENDIX

H. Rep. No. 1424, 67th Cong. 4th Sess., pp. 1, 2–3 (1939–1 Cum. Bull. (Part 2) 848)

The Committee on Ways and Means, to whom was referred the bill (H. R. 13775) to amend the revenue act of 1921 in respect to credits and refunds, having had the same under consideration, reports it back to the House without amendment and recommends that the bill do pass:

In order that the changes proposed by the bill may clearly appear the original text of section 252 of the revenue act of 1921 is set out below, the proposed changes being indicated in italics; the part in italics being new matter added:

> Sec. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes,

or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, *or unless before the expiration of one year from the time the tax was paid a claim therefor is filed by the taxpayer:*

* * * * *

Concerning the proposed bill the following letter has been received from the Treasury Department:

TREASURY DEPARTMENT,
Washington, January 13, 1923.

HON. WILLIAM R. GREEN,
Acting Chairman, Committee on Ways and Means,
House of Representatives.

MY DEAR MR. GREEN: I have your letter of January 12, requesting any comments that I may care to offer with reference to a bill, H. R. 13775, "To amend the revenue act of 1921 in respect to credits and refunds."

The proposed bill amends section 252 of the revenue act of 1921 in two respects: First, by providing that a refund or credit of income, war-profits or excess-profits taxes may be made if claim therefor is filed by the taxpayer with one year from the time the tax was paid even though not filed within five years from the time the return was due, and, second, by providing that where a tax is erroneously or illegally col-

lected from a withholding agent the refund shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

Section 252 of the revenue act of 1921 provides that no credit or refund of income, war-profits or excess-profits taxes shall be allowed after five years from the date when the return was due unless before the expiration of such five years a claim therefor is filed by the taxpayer. Section 3228 of the Revised Statutes, as amended by section 1315 of the revenue act of 1921, provides that a claim for the refunding or crediting of any internal-revenue tax erroneously or illegally collected must be presented to the Commissioner of Internal Revenue within four years after the payment of such tax. The present ruling of the Treasury Department is that section 252 of the revenue act of 1921 and section 3228 of the Revised Statutes should be read together, and that a refund or credit of income, war-profits or excess-profits taxes erroneously or illegally collected may be made if claim therefor was filed within four years after the tax was paid although not within five years after the return was due. The necessity for a provision allowing the filing of a claim within a given period after the tax is paid, even though not within five years after the return was due, is apparent. In the case of an additional assessment of income, war-profits or excess-profits taxes after the expiration of the five-year period from the time when the return was due, which is permissible in cases where the taxpayer has waived his rights under the statute of limitations, such assessment would be final

when made and the taxpayer would be barred from filing a claim for refund even to form the basis for a suit at law for the recovery of the taxes paid. The existing ruling of the Treasury Department, allowing a taxpayer to file a claim within four years after the tax is paid even though not within the five-year period after the return was due, is of very doubtful legality, and consequently it is deemed advisable to clarify the situation by means of legislation, and provide unequivocally that a claim for refund or credit may be considered by the Department if filed within a given period after the tax was paid even though not within five years from the time the return was due.

For the reasons stated above I approve the proposed bill amending the revenue act of 1921 both as to form and as to substance.

Yours very truly,

A. W. MELLON,
Secretary.

The purpose and effect of the bill is very clearly shown in the letter of the Secretary of the Treasury set out above. The committee concurs in the reasoning of the Secretary as to the necessity of making the law definite so that the taxpayer who has, by agreement with the Treasury, permitted the time for the final assessment of the taxes due from him to be made after the expiration of the five-year period, will not be barred from making a claim for a refund when such assessment is made and the taxpayer alleges that the assessment is illegal. While the Treasury Department is now permitting this to be done as a matter of common justice, the legal right to do so is questionable.

The committee believes that it is not necessary that the taxpayer should have four years after such a payment had been made and considers one year sufficient. That amount of time is accordingly given by the bill to the taxpayer after the payment in which to make his claim for a refund.

* * * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1947

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No. 71

In the Supreme Court of the United States

OCTOBER TERM, 1947

H. C. JONES, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

THE LIBERTY GLASS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 71

H. C. JONES, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

THE LIBERTY GLASS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 12–17) is reported in 66 F. Supp. 254. The opinion of the Circuit Court of Appeals (R. 20–23) and the dissenting opinion (R. 23–27) are reported in 159 F. 2d 316.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 21, 1947. (R. 27.) The petition for a writ of certiorari was filed on April 18, 1947, and was granted on June 2, 1947. (R. 28.) The jurisdiction of this Court is invoked under Sec-

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tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether claims for refund of income taxes must be filed within two years after the payment of the tax, as provided by Section 322 (b) of the Revenue Act of 1938 and the Internal Revenue Code, or within four years after the payment of the tax, as provided by Section 3313 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter [i. e., chapter 1, which deals only with income taxes], the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or *within two years from the time the tax was paid*, no credit or refund shall be allowed or made after the expiration of whichever

of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer. [Italics supplied.]

* * * * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 322.)

[The provisions of Section 322 (a) and (b) (1) of the Revenue Act of 1938 correspond in all material respects with the provisions of Section 322 (a) (1) and (b) (1) of the Internal Revenue Code.]

SEC. 3313. PERIOD OF LIMITATION UPON REFUNDS AND CREDITS.

All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, *except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes,* be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of *taxes other than income,* war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim,

or if no claim was filed, then during the four years immediately preceding the allowance of the refund. [Italics supplied.] (26 U. S. C. 1940 ed., Sec. 3313.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.322–3. CLAIMS FOR REFUND BY TAXPAYERS.—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see section 29.322–7.

* * * * * *

SEC. 29.322–7. LIMITATIONS UPON THE CREDITING AND REFUNDING OF TAXES PAID.—(a) *General rule.*—Unless a claim for

credit or refund of an overpayment is filed within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, the Commissioner is prohibited from allowing or making a credit or refund of income tax imposed by chapter 1 for such year after both periods have expired. If no return is filed by the taxpayer, the Commissioner is prohibited from allowing or making a credit or refund of such tax after two years from the time the tax was paid unless before the expiration of such 2-year period a claim therefor is filed. * * *[1]

STATEMENT

The facts as shown by the pleadings (R. 1–10) and the stipulation of facts (R. 11–12), and as found by the District Court (R. 13–14), may be summarized as follows:

The taxpayer is an Oklahoma corporation. (R. 11.) After having obtained an extension of time, the taxpayer on June 15, 1939, filed its corporation income and excess profits tax return for the calendar year 1938, which disclosed a taxable net income of $9,058.90 and indicated a total liability of $1,193.25, which it paid in 1939. (R. 11.) An additional assessment of $158.53 was also paid in

[1] Insofar as pertinent Sections 19.322–3 and 19.322–7, as amended by T. D. 5256, 1943 Cum. Bull. 550, Regulations 103 promulgated under the Internal Revenue Code, and Articles 322–3 and 322–7, Regulations 101, promulgated under the Revenue Act of 1938, are similar to the foregoing provisions.

1939. (R. 11.) Neither the original tax nor the additional tax mentioned is involved in this action.

Subsequent to the filing of the return and the additional assessment, a revenue agent's investigation of the taxpayer's income tax liability resulted in a further assessment in the amount of $7,992.59, and, after this amount was reduced for amounts previously paid, $6,640.81 remained due and was paid on March 8, 1941. (R. 11–12.) In the computation of this additional tax, certain adjustments were made, to none of which the taxpayer takes exception in this case. (R. 4–8, 11–12.)

On March 30, 1944, the taxpayer filed a claim for refund of $1,053.49, on the ground that during the year 1938, the taxpayer paid sums aggregating $75,191.78 on indebtedness of the corporation within the meaning of Section 27 (a) (4) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and that it was entitled to credit for such payments in an amount equal to two and one-half percent of its adjusted net income, or $1,053.49, and that failure to allow such credits was erroneous. (R. 3–8, 12.) The taxpayer stated in the claim that it was relying on the four-year limitation period provided in Section 3313 of the Internal Revenue Code. (R. 6.) The claim was rejected by the Commissioner of Internal Revenue in a letter in which it was pointed out that Section 3313 spe-

cifically exempts from its application income, war-profits, excess profits, estate and gift taxes. (R. 8–9, 12.)

This suit was then brought to recover the amount alleged by the refund claim to be due. (R. 1–9.) It was expressly stipulated that under the applicable revenue law, the taxpayer was required to file a corporation income and excess-profits tax return for the taxable year 1938. (R. 11.)

The Collector filed a motion to dismiss the complaint and for judgment on the pleadings (R. 10), which was overruled by the District Court (R. 17). Judgment was entered for the plaintiff (R. 17–18), and the Circuit Court of Appeals for the Tenth Circuit affirmed (R. 20–23), with Judge Huxman dissenting (R. 23–27).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that claims for refunds of erroneous assessments of income taxes are governed by the limitation provisions of Section 3313 of the Internal Revenue Code.

2. In holding that Section 322 (b) of the Internal Revenue Code [or of the Revenue Act of 1938] is not applicable to refund claims based on erroneous assessments of income taxes.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

The word "overpayment" as used in Section 322 and throughout the Internal Revenue Code refers to any excess amount paid by a taxpayer and thereafter determined not to have been owed to the Government. No support can be found to justify the distinction drawn by the court below between "overpayments" and "taxes erroneously or illegally assessed or collected". The statutory development and legislative history of Section 322 and Section 3313 of the Internal Revenue Code show clearly the Congressional intent that all claims for refund of income taxes are excluded from the provisions of Section 3313 and are governed by the provisions of Section 322. This view is in accord with a consistent, unambiguous and long-established administrative interpretation expressed in Treasury Regulations issued under every Revenue Act since 1924 and in numerous rulings and Treasury decisions. It accords also with expressions of this and lower courts in numerous cases.

The meaning attributed to the term "overpayment" by the decision below if consistently applied to other sections of the Internal Revenue Code would produce incongruous and harsh results. The payment of interest on refunds of erroneous assessments of tax would be without statutory sanction; the jurisdiction of the Tax Court would be curtailed; and other anomalous results would follow.

The result below finds support in a small number of comparatively recent lower court decisions, beginning with *Huntley* v. *Southern Oregon Sales*, 102 F. 2d 538 (C. C. A. 9), all of which fail to give proper recognition to the legislative history, the structure of the statute, and the administrative practice. There is no basis whatever for the conclusion that these decisions have received legislative acquiescence.

ARGUMENT

THE TAXPAYER'S CLAIM FOR REFUND IS BARRED BY THE STATUTE OF LIMITATIONS AS PRESCRIBED IN SECTION 322 (b)

Preliminary analysis.—This suit was brought by the taxpayer to recover income and excess profits taxes for the year 1938, which it had paid on March 8, 1941. However, the claim for refund upon which this suit is based was not filed until March 30, 1944, more than two years after payment. The Commissioner rejected the claim on the ground that it was barred by limitations. Section 322 (b) (1) of the Revenue Act of 1938, here involved, provides that unless a claim for "refund is filed by the taxpayer within * * *[2] two years from the time the tax was paid", no refund shall be allowed. The taxpayer, on the

[2] The omitted language gives the taxpayer an alternative period of three years from the time the return was filed. However, since the return in this case was filed in June 1939 (R. 11), no contention has ever been made here that the 1944 claim for refund was timely under that alternative period.

other hand, contends that the applicable period of limitations is four years from the date of payment, as provided in Section 3313 of the Internal Revenue Code. In contrast to Section 322, which relates exclusively to income and excess profits taxes, Section 3313 contains limitations provisions which relate to federal taxes generally. Section 3313 provides as follows:

> All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, *except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes,* be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. * * * [Italics supplied.]

Thus, the four-year period of limitations is applicable, "except as otherwise provided by law in the case of income, war-profits, excess-profits * * * taxes." And in the case of income and excess-profits taxes,[3] provision is "otherwise" made in Section 322, which requires that the claim for refund be presented within two years of payment.

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[3] In the case of estate and gift taxes provision is "otherwise" made in Sections 910 and 1027 of the Internal Revenue Code.

In ruling that the two-year period in Section 322 was inapplicable, the court below noted that Section 322 dealt with "overpayments" of taxes, whereas Section 3313 speaks of taxes "erroneously or illegally assessed or collected"; and the court concluded that Section 322 was intended merely to "govern overpayments resulting from errors occurring in the preparation of the return, or in other somewhat similar circumstances" (R. 21). Accordingly, it held that the refund here sought is based on a tax "erroneously or illegally" assessed, and not on an "overpayment", with result that the four-year period in Section 3313 was applicable rather than the two-year period in Section 322. We respectfully submit that there is not the slightest basis for any such distinction between an "overpayment" and a tax "erroneously or illegally assessed", either in the legislative history, the structure of the statute, or the administrative practice. To the contrary, the legislative history is clear that Section 322 was intended to establish an entirely separate and self-contained statute of limitations for the recovery of income taxes, and the very language of Section 3313 explicitly recognizes these special provisions. A great multitude of cases have proceeded upon this assumption, and the statute has been consistently so administered by the Treasury. The word "overpayment" is simply a comprehensive term embracing every kind of payment in excess of what the taxpayer owed. The distinction adopted by the court below is wholly unwarranted.

A. The term "overpayment" as used in Section 322 includes taxes alleged to have been "erroneously or illegally assessed or collected"

There is nothing in the use of the word "overpayment" which excludes from its meaning an overpayment made because the tax was "erroneously or illegally assessed". The word "overpayment" is merely a convenient term—generic in character—expressing in ordinary language the idea of any amount paid by a taxpayer in excess of what may later be determined to have been owing to the Government. It matters not whether the error giving rise to the payment was mathematical, or one of judgment, or an erroneous interpretation of the facts or the Regulations or the law, or whether made by the taxpayer or the Commissioner. The ultimate question is whether the taxpayer has *paid* to the Government an amount *over* and above his true liability.[4]

This Court has frequently expressed this idea. In *Lewis* v. *Reynolds*, 284 U. S. 281, the following statement of the lower court is quoted (p. 283):

> The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. * * * The action to re-

[4] *Cf.* T. D. 3251, 5 Cum. Bull. 245 (1921).

> cover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him.

The opinion then added (p. 283):

> We agree with the conclusion reached by the courts below.
>
> * * * An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

The sections then under consideration were Section 284, Revenue Act of 1926, c. 27, 44 Stat. 9, and Section 322, Revenue Act of 1928, c. 852, 45 Stat. 791, the precursors of Section 322, Internal Revenue Code. In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, Mr. Justice Cardozo discussed the general concept of overpayment as follows (p. 69):

> The respondent filed a claim for taxes overpaid, a claim for money had and received to his use by the agents of the government. The identity of the cause of action may be said in one aspect to depend upon *the mere fact of overpayment*, the existence of a net balance owing to the taxpayer after the

> ascertainment *of all items* of debit and of credit. In another aspect it may be said to depend upon the identity of the *items illegally exacted,* and hence upon the particular grounds that determine illegality. [Italics supplied.]

Thus, this Court recognized that items "illegally exacted" are included within the term "overpayment".[5]

Judge Huxman dissenting below fully adhered to this view (R. 25):

> The word "overpayment" is not a word of art, but a word having a general meaning. In general, payment may be defined as a satisfaction of an obligation by the delivery of or transfer of that which is due. So, overpayment may be defined as a payment or delivery of more than is due. Whether the payment results from an error on the part of taxpayer in making and filing his return or from erroneous assessments by the Collector when made, it is an overpayment or a payment of more than is due.

Not only does the term "overpayment" as used in Section 322 support our position, but so too does the very structure of Section 3313. The first sentence of Section 3313 spells out the general four-year period, "except as otherwise provided by law in the case of income * * *

[5] See also *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 83, 84–85.

taxes". The second sentence of Section 3313 deals with the *amount* of refund, and provides:

> The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

Thus, the amount of refund may not exceed the amount paid during the four-year period. But the words in the parenthesis show that this provision has no application to income taxes.[6] Thus, if the court below is correct, there would be no limitation whatever on the amount of refund of income taxes illegally collected; for, Section 3313 explicitly excludes income taxes, and according to the ruling of the court below they would not be "overpayments" subject to the limitations of Section 322. Yet, the legislative history[7] cannot

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[6] See S. Rep. No. 665, 72d Cong., 1st Sess., p. 58 (1939–1 Cum. Bull. (Part 2) 496, 538); H. Conference Rep. No. 1492, 72d Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2), 539, 553): "Amendment No. 261: Under this amendment a refund of *miscellaneous* taxes can not exceed the amount of the tax paid during the four years immediately preceding the filing of the claim, or, if no claim is filed, then during the four years immediately preceding the allowance of the refund. * * *" (Italics supplied.)

[7] S. Rep. No. 398, 68th Cong., 1st Sess., p. 33 (1939–1 Cum. Bull. (Part 2) 266, 289; H. Conference Rep. No. 844, 68th

support such a result and the administrative practice[8] has restricted the amount of the refund of an erroneous income tax assessment to that permitted by Section 322.

In addition to the language used in Sections 322 and 3313 which we submit sufficiently demonstrates the error of the decision below, the use of the term "overpayment" in numerous other sections of the Internal Revenue Code would be inexplicable if the basis of the decision were to be applied consistently to them. Such sections as Sections 781 (b), 3779 (i), 3780 (b), 3807 (b) of the Code and Sections 457 and 501 (c) of the Revenue Act of 1942—and perhaps more especially, the broad relief provisions of Sections 322 (b) (5) and 322 (g) of the Code—would require reasons far more subtle and persuasive than that which the court below gives to explain the use therein of the term "overpayment".

The reason for the inclusion in the revenue laws of more than one section establishing limitations on the filing of refund claims is not because of the distinction drawn by the court below, but by

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Cong., 1st Sess., pp. 24–25 (1939–1 Cum. Bull. (Part 2) 300, 308).

[8] *Cf. Brewer* v. *National Life & Acc. Ins. Co.*, 119 F. 2d 313, 315 (C. C. A. 6th); *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *A. S. Kreider Co.* v. *United States*, 117 F. 2d 133 (C. C. A. 3d), reversed on other grounds, 313 U. S. 443. In each of these cases, and those cited in the *Brewer* opinion, consistent administrative action is apparent.

the separate treatment * provided throughout the revenue laws for income, profits, estate and gift taxes as distinguished from those known as "Miscellaneous" and "Excise, Import and Temporary"

* Examples of such separate treatment for income, profits, gift and estate taxes may be found in the following sections of the Code: Sections 322, 871 and 1012 conferring jurisdiction in the Tax Court over such taxes; Section 3777 providing for review by the Joint Committee on Internal Revenue Taxation of refunds authorized in excess of $75,000; Section 3801, providing for certain mitigation of the statute of limitations in income tax cases; Section 3804 (a) (1) (A), (B) and (C), extending the time for filing returns, making payment, or filing Tax Court petitions in respect of such taxes; Section 3807, extending the period of limitations for income and profits taxes; Section 1116 (a) (2), Revenue Act of 1926 defining the expression "date of the allowance of the refund"; *cf.* the separate revision of the income tax tile in 1928. Report of the Joint Committee on Internal Revenue Taxation (1928) Vol. II: Proposed Rearrangement of Income Tax Title.

Separate titles for income taxes as distinguished from miscellaneous taxes have always been found in the Revenue Acts since 1916. Title I of that Act, c. 463, 39 Stat. 756, for example, encompassed all provisions for the levying, assessment and collection of income taxes. A separate title (IV) was provided for miscellaneous taxes. Similarly, the use of separate titles within the Revenue Acts continued through all the Revenue Acts until their codification in the Internal Revenue Code. Although it is recognized that no inference may properly be drawn from the arrangement of the Code itself (see Section 6, Act of February 10, 1939, c. 2, 53 Stat. 1, codifying the Internal Revenue laws), the following explanation by the House Ways and Means Committee of the arrangement of the Code is significant (H. Rep. No. 6, 76th Cong., 1st Sess., pp. 3–4 (1939–2 Cum. Bull. 532, 534)):

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taxes.[10] Such separate treatment is based upon broad considerations of administrative convenience and necessity. The difficulty of auditing the vast number of income tax returns as compared

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The final step was to arrange the code in a logical and convenient manner. There are six subtitles. Subtitle A contains those taxes over which the United States Board of Tax Appeals has jurisdiction. These include income, estate, and gift taxes.

Subtitle B contains the miscellaneous taxes.

Subtitle C contains the temporary taxes.

Subtitle D contains the general administrative provisions.

Subtitle E contains the personnel provisions.

Subtitle F contains provisions relating to the Joint Committee on Internal Revenue Taxation.

The purpose of this arrangement is to make the subtitles as far as possible complete in themselves. For example, those interested solely in provisions relating to income, estate, or gift taxes need concern themselves only with subtitles A and D, and may disregard the provisions relating to tobacco, liquor, and other miscellaneous taxes, which are included in subtitle B, as well as the provisions relating to temporary taxes, in subtitle C. In subtitle D, all general administrative provisions have been collected.

Cf. H. Rep. No. 2, 70th Cong., 1st Sess., pp. 11–12 (1939–1 Cum Bull. (Part 2) 384, 391–392; S. Rep. No. 960, 70th Cong., 1st Sess., p. 18 (1939–1 Cum. Bull. (Part 2) 409, 421; H. Conf. Rep. No. 1882, 70th Cong., 1st Sess., p. 21 (1939–1 Cum. Bull. (Part 2) 444, 452).

[10] There are more than twenty such taxes now in existence. They are imposed by Chapters 6–28 of Subtitle B—Miscellaneous Taxes, on such varied subjects as: Alaskan Railroads (Section 1300); admissions and dues (Section 1700); documents, other instruments and playing cards (Section 1800); safe deposit boxes (Section 1850); bank circulation (Section 1900); cotton futures (Section 1920); tobacco, snuff, cigars and cigarettes (Section 2000); oleo-

with those required for miscellaneous taxes explains the numerous revisions of the assessment and refund sections governing income taxes although the miscellaneous tax sections remained relatively stable."

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margarine (Section 2300); filled cheese (Section 2350); retailers excises (Section 2400); coconut and other vegetable oils (Section 2470); fish, animal and vegetable oils (Section 2490); narcotics (Section 2550); white phosphorous matches (Section 2650); firearms (Section 2700); liquor (Section 2800); occupations (Section 3200); manufacturers excises (Section 3400); transportation and communication (Section 3460); transfers and conveyances (Section 3481); sugar (Section 3490); bituminous coal (Section 3520).

[11] House Hearings on Revenue Act of 1918, 65th Cong., 2d Sess., pp. 120–121. Separate treatment of income tax refunds first appeared in Section 14 (a), Revenue Act of 1916, c. 463, 39 Stat. 756. The section was modified by Section 252, Revenue Act of 1918, c. 18, 40 Stat. 1057. Subsequent amendments and revisions appeared in Section 252, Revenue Act of 1921, c. 136, 42 Stat. 227; the Act of March 4, 1923, c. 276, 42 Stat. 1504, Sec. 1; the Act of March 13, 1924, c. 55, 43 Stat. 22; Section 281, Revenue Act of 1924, c. 234, 43 Stat. 253; the Act of March 3, 1925, c. 435, 43 Stat. 1115; Section 284, Revenue Act of 1926, c. 27, 44 Stat. 9; Section 322, Revenue Act of 1928, c. 852, 45 Stat. 791; Section 2, Joint Resolution of June 16, 1930, c. 495, 46 Stat. 589; Section 322 of the Revenue Act of 1932, c. 209, 47 Stat. 169, the Revenue Act of 1934, c. 277, 48 Stat. 680, the Revenue Act of 1936, c. 690, 49 Stat. 1648, the Revenue Act of 1938, c. 289, 52 Stat. 447, and of the Internal Revenue Code; Sections 169 and 172 (e) (1), Revenue Act of 1942, c. 619, 56 Stat. 798; Section 4 (a), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126; Section 6 (b), (9) and (10), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231; and Section 5, Tax Adjustment Act of 1945, c. 340, 59 Stat. 517.

B. The legislative history of Sections 322 and 3313 conclusively supports the Government's position

An examination of the legislative development of the refund sections clearly shows that the Government's position is in harmony with the understanding and intention of Congress.

Prior to the Revenue Act of 1916 (the first Revenue Act to contain a separate income tax title) claims for refund of any internal revenue tax "erroneously or illegally assessed or collected" were required to be presented within two years after the cause of action accrued. Section 3228, Revised Statutes (Appendix, *infra*). Section 14 (a) of the Revenue Act of 1916 removed income taxes from the limitation period of Section 3228 of the Revised Statutes [the predecessor of Section 3313 of the Code] by the following provision exempting all income taxes from its scope:

> * * * upon the examination of any return of income made pursuant to this title [the income tax title], * * * if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes * * *.

Thus began the statutory scheme of separate treatment for income taxes different from others.

Section 252 of the Revenue Act of 1918 con-

tinued this scheme of separate treatment but reinstated a restriction on refund claims by inserting a specific period of five years from the date the return was due for filing such claims. The limitation was applicable to claims which arose whenever—

> it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due.

This coincided with the assessment and collection limitation of five years in Section 250 (d) which operated against the Government.

The Revenue Act of 1921 reenacted the provisions of Section 252 with changes not here relevant. The five year limitation (from the date when the return was due) was continued. Revised Statutes, Section 3228, however, was amended by Section 1316 of the 1921 Act to require claims for refund of any internal revenue tax "erroneously or illegally assessed or collected" to be presented within four years after payment. The sole effect of this amendment was to change the limitation period which had theretofore been two years after the cause of action accrued.[12] It

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[12] S. Rep. No. 275, 67th Cong., 1st Sess., pp. 21–22 (1939–1 Cum. Bull. (Part 2) 181, 196).

Section 1316 also added a sentence to conform Section 3228 with the reference to it in Section 252. This sentence read—

"This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918."

may be noted that the term "overpayment" did not appear in Section 252 of this Act.

At this point, therefore, Section 252 governed claims for refund of income, war-profits or excess-profits taxes "paid in excess of that properly due". Section 3228 governed claims for refund of any internal revenue tax "erroneously or illegally assessed or collected".

However, because the limitation period for income taxes was computed from the date the return was due there arose situations when the taxpayer, having waived the statute of limitations against assessment by the Commissioner, paid the assessed tax only to find that the period of limitations on refund claims had expired leaving him without any opportunity whatever to claim a refund. The Treasury Department recognized the unfairness of such a situation and construed Section 252 and Section 3228 together so that there would remain four years after the payment of the tax within which the taxpayer's claim for refund might be filed.[13]

But this interpretation was recognized to be of doubtful legality. Accordingly in 1923, Secretary of the Treasury Mellon proposed to the Chairman of the House Ways and Means Committee that certain changes be made in Section 252 of the Revenue Act of 1921 and in a letter

[13] T. D. 3416, I-2 Cum. Bull. 228 (1922); I. T. 1269, I-1 Cum. Bull. 311 (1922), *Cf.* Sol. Op. 79, 3 Cum. Bull. 302, 306 (1920); Mim. 2764, 4 Cum. Bull. 332 (1921); L. O. 1093, I-1 Cum. Bull. 319 (1922).

offered the following explanation of the need for the changes (H. Rep. No. 1424, 67th Cong., 4th Sess., p. 2 (1939–1 Cum. Bull. (Part 2) 848, 849–850)):

> Section 252 of the revenue act of 1921 provides that no credit or refund of income, war-profits or excess-profits taxes shall be allowed after five years from the date when the return was due unless before the expiration of such five years a claim therefor is filed by the taxpayer. Section 3228 of the Revised Statutes, as amended by section 1315 [*sic*] of the revenue act of 1921, provides that a claim for the refunding or crediting of any internal-revenue tax erroneously or illegally collected must be presented to the Commissioner of Internal Revenue within four years after the payment of such tax. The present ruling of the Treasury Department is that section 252 of the revenue act of 1921 and section 3228 of the Revised Statutes should be read together, and that a refund or credit of income, war-profits or excess-profits taxes erroneously or illegally collected may be made if claim therefor was filed within four years after the tax was paid although not within five years after the return was due. The necessity for a provision allowing the filing of a claim within a given period after the tax is paid, even though not within five years after the return was due, is apparent. In the case of an *additional assessment* of income, war-profits or excess-profits taxes after the expiration of

> the five-year period from the time when the return was due, which is permissible in cases where the taxpayer has waived his rights under the statute of limitations, such assessment would be final when made and the taxpayer would be barred from filing a claim for refund even to form the basis for a suit at law for the recovery of the taxes paid. *The existing ruling* of the Treasury Department, allowing a taxpayer to file a claim within four years after the tax is paid even though not within the five-year period after the return was due, *is of very doubtful legality,* and consequently it is deemed advisable to clarify the situation by means of legislation, and provide unequivocally that a claim for refund or credit [14] may be considered by the Department if filed within a given period after the tax was paid even though not within five years from the time the return was due. (Italics supplied.)

The House Ways and Means Committee recommended the change as requested by the Secretary of the Treasury. The Committee Report, after reproducing the Mellon letter, continued as follows:

> The purpose and effect of the bill is very clearly shown in the letter of the Secretary of the Treasury set out above. The committee concurs in the reasoning of the Secretary as to the necessity of making the

[14] "Of an erroneous or illegal assessment," clearly is the meaning.

> law definite so that the taxpayer who has, by agreement with the Treasury, permitted the time for the final assessment of the taxes due from him to be made after the expiration of the five-year period, will not be barred from making a claim for a refund when such assessment is made and the taxpayer *alleges that the assessment is illegal.* While the Treasury Department is now permitting this to be done as a matter of common justice, the legal right to do so is questionable. The committee believes that it is not necessary that the taxpayer should have four years after such a payment had been made and considers one year sufficient. That amount of time is accordingly given by the bill to the taxpayer after the payment in which to make his claim for a refund. [Italics supplied.]

The Senate Finance Committee adopted the House Report (S. Rep. No. 1137, 67th Cong., 4th Sess., p. 1 (1939–1 Cum. Bull. (Part 2) 848)), and the amendment was passed and became law.[14a] See Act of March 4, 1923, Appendix, *infra.*

This Congressional purpose, that is, permitting claims for refund of income taxes "erroneously or illegally" collected to be filed within two years after the tax was paid, in addition to the period after the due date on the return, was effected by inserting *within Section 252,* as it appeared in the Revenue Act of 1921, the following clause:

[14a] The Senate changed the period from one year as passed by the House to two years and this change was agreed upon in conference. H. Conference Rep. No. 1757, 67th Cong., 4th Sess. (1939–1 Cum. Bull. (Part 2) 856).

"* * * or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer". (S. Rep. No. 1137, 67th Cong., 4th Sess., p. 6 (1939–1 Cum. Bull. (Part 2) 848, 853)). The importance of amending the Act in this manner, by changing Section 252, without making a change in Section 3228 of the Revised Statutes to accomplish the named purpose is most important, for the conclusion becomes inescapable that Section 252, although referring in terms only to "excess" payments, was intended also to govern claims for refund of taxes "erroneously or illegally" collected. Moreover, if the distinction made by the court below were valid, there would have been no need for such an amendment, since there would have been no doubt that claims for refund of income taxes "erroneously or illegally" collected would be governed by the provisions of Section 3228 of the Revised Statutes, and the limitation period would run from the time of payment as there provided. This, then is a clear expression of Congressional intent that Section 252, as amended, should govern claims for refund of income taxes erroneously or illegally assessed.[15]

[15] The taxpayer urged in the court below that the plain language used by the Secretary of the Treasury and the House and Senate Committees must be wholly disregarded because Section 1 (b) of the Act of March 4, 1923, Appendix, *infra*, amending Section 252 made mention of refunds of income taxes to withholding agents which might be made under "section 3228 of the Revised Statutes". Without further explanation so incidental a reference on a different though re-

And this Court so held in *Graham* v. *duPont*, 262 U. S. 234, decided May 21, 1923, within three months after the 1923 amendment. In that case the taxpayer sought to enjoin the collection of income tax (alleged to be illegally assessed) on the ground that, if paid, Section 252 would preclude recovery. The Court rejected the taxpayer's contention saying (p. 258):

> It is certain that by the amendments to § 252 and § 3226, Rev. Stats., by the Act of March 4, 1932, c. 276, 42 Stat. 1504, the complainant is given the right now to pay the tax, and sue to recover it [the illegal assessment] back * * *.

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lated problem should scarcely be interpreted as requiring the disregard of all else appearing in the Committee Reports. Moreover, the simple answer is that the amendment was retroactively applied to those refund claims filed prior to March 4, 1923, which, under the administrative practice prior thereto (referred to as of "doubtful legality" in the Mellon letter, *supra*) were permitted to be filed within the time limitation of Section 3228, Revised Statutes. Therefore, as to claims pending on March 4, 1923, which were timely filed under Section 3228 although not timely under Section 252, as amended, refunds to withholding agents as contemplated by Section 1 (b) of the Act of March 4, 1923, were necessarily made under Section 3228. *Cf.* S. M. 2293, III–2 Cum. Bull. 310 (1924). Furthermore, whatever may have been the significance of the phrase as then used, it was omitted in all later Revenue Acts which make the same provision for such refunds. Section 281, Revenue Act of 1924; Section 284, Revenue Act of 1926; Section 144 (f), Revenue Act of 1928; Section 143 (f) of the Revenue Act of 1932, the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938 and the Internal Revenue Code. *Cf. American Hide & L. Co.* v. *United States*, 284 U. S. 343, 350.

Unquestionably, therefore, at least after the 1923 amendment to Section 252 that section was intended to be exclusive as to income taxes, whether "erroneously or illegally" collected or not.

When Congress considered the contemplated Revenue Act of 1924, A. W. Gregg of the Treasury Department, who was in charge of the group which drafted the new bill, appeared before the House Ways and Means Committee and Senate Finance Committee to explain the proposed bill.[16] Each section of the bill was analyzed separately. After reading the text of Section 281 (a), and stating that it in effect was the same as existing law, Mr. Gregg then proceeded to read and explain the next subsection as follows (p. 42):

> "(b) Except as provided in subdivisions (c) and (d) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer."
>
> As it is now, the period of limitation on the filing of a claim for a refund is very complicated. It is five years from the time the return was due or two years from the time the tax was paid, either one. It seemed to the department and to the House that the proper time for the statute to begin running is the time that the tax was paid, because that is the time when the

[16] Senate Hearings on Revenue Act of 1924, 68th Cong., 1st Sess., pp. 2–57.

right of action for recovery accrued; and four years is the same period that we put on the Government's right to assess.

Senator WATSON. Instead of two?

Mr. GREGG. It is now five years from the time the return was due or two years from the time the tax was paid, both. * * *

This explanation is in effect repeated in the "Gregg Statement" (Statement of the Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, Senate Committee Print, 68th Cong., 1st Sess., March 6, 1924) where the amendment to Section 3228 of the Revised Statutes by Section 1012 (a) of the proposed revision was discussed. That amendment, which reworded and changed the location of the exceptive clause of Section 3228, so that it read almost as it does now in Section 3313 of the Code, is explained thus (p. 37):

> Subdivision (a) has been changed only by specifically excepting the cases provided for in section 281 of the bill, in lieu of the present exception of those provided for in section 252 of the existing law. Section 281 of the bill, with reference to refunds [N. B. The reference is to "refunds" and not "overpayments".] of income taxes, corresponds in subject matter to section 252 of the existing law; the changes in its provisions are noted under section 281 *supra*. The exception has also been reworded to remove the doubt which now exists as to whether or not the provisions of section

3228, Revised Statutes, apply in any event to income taxes.

This was quoted verbatim by the House Ways and Means and Senate Finance Committees as their explanation of the amendment, H. Rep. No. 179, 68th Cong., 1st Sess., pp. 70–71 (1939–1 Cum. Bull. (Part 2) 241, 264–265); S. Rep. No. 398, 68th Cong., 1st Sess., p. 44 (1939–1 Cum. Bull. (Part 2) 266, 296).[17]

Thus, in addition to this Court's decision in the *duPont* case, *supra*, the clear evidence of the Treasury's understanding of the 1923 amendment and Congress' understanding of that amendment

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[17] See also *Hills* v. *United States*, 50 F. 2d 302 (C. Cls.), and *United States* v. *Clarke*, 69 F. 2d 748 (C. C. A. 3d), certiorari denied, 293 U. S. 564.

A proposed subsection (d), permitting income tax refund claims to be filed despite the bar of the statute of limitations whenever a decision of the Supreme Court held invalid a Treasury Regulation under which the tax was assessed, was met with the suggestion that the amendment be made more inclusive (Senate Hearings, *supra*, p. 45):

"Senator Watson. Senator McCumber was up here yesterday and talked to me and other Senators on this very section. He wanted the words "or other internal revenue tax" inserted after the words "excess-profits tax"; in other words, if the Supreme Court declared any tax illegal which had been collected, why, then, there ought to be a refund. It ought not to be confined alone to excess-profits taxes or war taxes. There ought to be a refund.

"Mr. Gregg. Senator Watson, this section deals only with incomes, war-profits, or excess-profits taxes. That would more properly come in section 3228, Revised Statutes."

This provision, however, was stricken by the Senate Finance Committee and never adopted. S. Rep. No. 398, 68th Cong., 1st Sess., p. 34 (1939–1 Cum. Bull. (Part 2) 266, 289)

and the 1924 revision, we also have the underlying corroborative testimony from the draftsman of that revision[18] (in which, it may be emphasized, the term "overpayment" first appeared in the section under consideration). Non-Congressman though he was his understanding carries the stamp of authority. *Cf. United States* v. *Amer. Trucking Ass'ns.*, 310 U. S. 534, 547–548.

The changes in the status subsequent to the Revenue Act of 1924, Appendix, *infra*, are in harmony with the amendments just analyzed and tend to support our position. (See especially the addition of the second sentence to Section 3228, Revised Statutes, by the Revenue Act of 1932 discussed, *supra*, pp. 14–15.)

Nonetheless the court below made but passing reference to this analysis (R. 22):

> There is no need to detail the extended legislative history on which the collector relies. It is enough to say that we have examined it with care and we do not think it necessarily supports the contention; and further, that it falls short of overcoming the fairly plain language used in the two sections of the statutes.[19]

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[18] See also Senate Hearings on Revenue Act of 1924, 68th Cong., 1st Sess., p. 52. In connection with the 1926 Act see H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 48 (1939–1 Cum. Bull. (Part 2) 361, 375).

[19] Judge Huxman, on the other hand, found the Committee Reports to be a clear indication of the intention "not only [of] the Treasury Department but also the House and Senate" to include erroneous income tax assessments within the purview of Section 252. (R. 25–26.)

This conclusion in the teeth of an unusually clear legislative history, is, we submit, wholly without justification.

C. The decision below is contrary to a consistent, unambiguous and long established administrative practice

The decision here overturns a long established administrative practice which, until comparatively recently, had not been challenged. In many cases the controlling effect of Section 322 (b) was assumed without question. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *Garbutt Oil Co.* v. *United States*, 89 F. 2d 749 (C. C. A. 9th); *Graham* v. *duPont*, 262 U. S. 234; *duPont* v. *Graham*, 283 Fed. 300 (D. Del.), *affirmed per curiam*, 284 Fed. 1017 (C. C. A. 3d); *Pelham Hall Co.* v. *Carney*, 111 F. 2d 944 (C. C. A. 1st); *Commissioner* v. *Rieck*, 104 F. 2d 294 (C. C. A. 3d), certiorari denied, 308 U. S. 602; *Welch Ins. Agency* v. *Brast*, 55 F. 2d 60 (C. C. A. 4th), certiorari denied, 285 U. S. 555; *Lucas* v. *United States*, 45 F. 2d 291 (App. D. C.); *Weinburg* v. *United States*, 25 F. Supp. 83 (C. Cls.), certiorari denied, 306 U. S. 661; *Central Hanover Bank & Trust Co.* v. *United States*, 67 F. Supp. 920 (S. D. N. Y.); *State Street Trust Co.* v. *United States*, 59 F. Supp. 467 (D. Mass.), affirmed *per curiam*, 151 F. 2d 1022 (C. C. A. 1st); *cf. United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Commissioner* v. *Gooch Co.*, 320 U. S. 418; *Rosenman* v. *United States*,

323 U. S. 658; *Lewis* v. *Reynolds*, 48 F. 2d 515 (C. C. A. 10th), affirmed, 284 U. S. 281; *United States* v. *Frauenthal*, 138 F. 2d 188 (C. C. A. 8th); *Hyatt Roller Bearing Co.* v. *United States*, 43 F. 2d 1008, 1021 (C. Cls.); *Wisconsin Nat. Life Ins. Co.* v. *United States*, 42 F. 2d 316 (C. Cls.).[20]

The Treasury Regulations issued under every Revenue Act since 1924 have contained only one article dealing with the time limit on claims for refund of income taxes and have provided that they be filed within the time prescribed in Section 322 (b) or its predecessors.[21] The language of this article, Section 29.322–7, Regulations 111, quoted *supra*, p. 5, plainly indicates the understanding of the Treasury that all income tax refund claims are governed by Section 322, for the article says that "the Commissioner is prohibited from allowing or making a credit or refund of *income tax* imposed by chapter I" (italics supplied) after both periods found in Section 322 have expired. Moreover, Section

[20] *Huntley* v. *Southern Oregon Sales*, 102 F. 2d 538 (C. C. A. 9th), the first case in which the question was raised, was not decided until 1939 and was thought to be of narrow application. *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679 (C. C. A. 6th), was decided in November, 1943. These are discussed *infra*, pp. 44–49.

[21] Sections 19.322–3 and 19.322–7 of Regulations 103 (1939); Articles 322–3 and 322–7 of Regulations 101 (1938), Regulations 94 (1936) and Regulations 86 (1934); Articles 1254 and 1257 of Regulations 77 (1932) and Regulations 74 (1928); Articles 1304 and 1305 of Regulations 69 (1926); and Articles 1306 and 1307 of Regulations 65 (1924). *Cf.* Article 1036 of Regulations 62 (1921).

29.322–3, quoted *supra*, p. 4, refers specifically to refund claims of taxes "erroneously or illegally collected" and for the limitations on refunds of such payments Section 29.322–3 is cross referenced to Section 29.322–7. Under these Regulations there is no ground for a supposed distinction between overpayments on the original return and erroneous collections. These sections are found in almost identical terms in all income tax regulations since Regulations 65, promulgated under the Revenue Act of 1924.

This administrative interpretation [22] that all income tax refund claims are governed by Section 322 or its predecessors is buttressed by numerous rulings and Treasury decisions consistent with the Regulations. Conspicuous examples of these are the following:

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[22] See, for example, Treasury Form 843 (Revised April 1940), on which all claims for refund of income and other taxes must be filed. This form requires the Collector to indicate which one of the three types of claims the taxpayer has filed: (1) Refund of Tax Illegally Collected, (2) Refund of Amount Paid for Stamps Unused, or Used in Error or Excess, and (3) Abatement of Tax Assessed (not applicable to estate or income taxes). There is no place to designate so-called "overpayments." The use of this form was explained by the Commissioner in a letter quoted in *Connell* v. *Hopkins*, 43 F. 773, 775 (N. D. Tex.), as follows:

"Relative to the clause 'refund of taxes illegally collected', shown on the former claim for refund (Form 843), you are advised, it is intended to cover cases in which, through ignorance of the law or the proper method of computation, claimants might insert incorrect amounts, and, on examination of the claim, it is found that taxpayer is entitled to more than the amounts specified on the items set forth as grounds for refund."

I. T. 1447, I-2 Cum. Bull. 220 (1922):

Held: The amount of any *ad valorem* penalty and interest which has been *collected without authority* may be made the subject of a claim for credit against income, excess-profits or war-profits taxes due under other returns if claim for refund is filed within the five-year period of Section 252 of the 1918 and 1921 Revenue Acts.

T. D. 3457, II-1 Cum. Bull. 177 (1923) and T. D. 3462, amending Regulations 62, II-1 Cum. Bull. 180 (1923):

Held: Refunds of income taxes erroneously or illegally assessed or collected are, by the Act of March 4, 1923, expressly governed by Section 252 of the Revenue Act of 1921, as amended.

S. M. 1712, III-1 Cum. Bull. 345 (1924):

Held: Section 252 of the 1924 Act is applicable to claims for refund of an "amount of additional assessment" [referred to as an "overpayment"].

S. M. 2293, III-2 Cum. Bull. 310 (1924):

Held: Claims for refund of additional assessments of income tax are disallowed because not filed within the time prescribed by the Act of March 4, 1923, "notwithstanding the fact that they may have been filed within the four-year period prescribed in section 3228, Revised Statutes, as amended."

G. C. M. 3152, VII–1 Cum. Bull. 153 (1928):

Held: Payments of additional assessments are "overpayments".

G. C. M. 13759, XIII–2 Cum. Bull. 102 (1934):

Held: Claims for refund of taxes erroneously or illegally assessed or collected filed by the Alien Property Custodian are subject to the periods of limitation prescribed by the various Revenue Acts. [This ruling is found under the heading: "Supplement O.—Overpayments. Section 322.—Refunds and Credits."]

Mim. 4814, 1938–2 Cum. Bull. 96:

Held: The two year period of Section 322 (b), dating from the payment of the tax, is applicable to those cases in which *no return* is filed by the taxpayer. [The tax must therefore have been paid as a deficiency assessment—not "on the return".]

I. T. 3483, 1941–1 Cum. Bull. 397:

Held: Claims for refund of income tax *deficiencies,* paid on February 28, 1938, are, when filed on February 29, 1940, a leap year, within the two year period prescribed by Section 322 (b) (1) of the Revenue Act of 1934.

Under familiar principles, a consistent administrative construction of such long standing is entitled to great weight. Cf. *Taft* v. *Commissioner,* 304 U. S. 351, 357; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Douglas* v. *Commissioner,* 322 U. S. 275, 281; *Boehm* v. *Commissioner,* 326 U. S. 287, 291–292.

Nor is the evidence that the term "overpayments" includes "erroneous assessments" and "illegal collections" confined to rulings of the Treasury Department. Opinions of this Court clearly indicate the same understanding. The language in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, and *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, is unequivocal in that respect. Again, in *United States* v. *Kales*, 314 U. S. 186, it was said (pp. 197–198):

> Originally, payment under protest to an internal revenue collector of *illegally* exacted taxes gave rise to a common law cause of action against the collector for restitution of *the overpayment*. [Italics supplied.]

In many other decisions there is plainly implicit the understanding that "overpayments" and "erroneous assessments" are synonymous.[23]

[23] Refund claims arising from "erroneous assessments" discussed as "overpayments": *United States Cartridge Co.* v. *United States*, 284 U. S. 511; *U. S. ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *Maass* v. *Higgins*, 312 U. S. 443; *United States* v. *Kales*, 314 U. S. 186; *Safe Deposit & Trust Co. of Baltimore* v. *Tait*, 54 F. 2d 383 (D. C. D. Md.); *American Security & Trust Co.* v. *Tait*, 5 F. Supp. 337 (D. Md.); *Weinburg* v. *United States*, 25 F. Supp. 83 (C. Cls.), certiorari denied, 306 U. S. 661. Refund claims arising from payments on the return discussed as "erroneous or illegal assessments and collections"; *Girard Trust Co.* v. *United States*, 270 U. S. 163; *United States* v. *Memphis Cotton Oil Co.*, *supra*; *Huntley* v. *Standard Timber Co.*, 62 F. 2d 568 (C. C. A. 9th); *McKesson & Robbins* v. *Edwards*, 57 F. 2d 141 (C. C. A. 2d); *Wm. J. Friday & Co.* v. *United States*, 48 F. 2d 225, 226 (W. D. Pa.);

D. The decision below as applied to other sections of the Internal Revenue Code would produce incongruous and harsh results

1. *The payment of interest on refunds of erroneous assessments of tax would be prohibited*—The effect of the basis of the decision below is to cast serious doubt upon the right of the Commissioner of Internal Revenue to pay interest on refunds of income taxes erroneously assessed or collected. The only statutory provision which permits the payment of interest on refunds is Section 3771 (a) of the Internal Revenue Code, which provides that—

> Interest shall be allowed and paid upon any overpayment in respect of any internal

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Grays Harbor Motorship Corp. v. *United States*, 45 F. 2d 259, 281, 282 (C. Cls.); *Wisconsin Nat. Life Ins. Co.* v. *United States*, 42 F. 2d 316 (C. Cls.); *Great Southern Life Ins. Co.* v. *United States*, 42 F. 2d 319 (C. Cls.); *McCarl* v. *United States ex rel. Leland*, 42 F. 2d 346 (App. D. C.); *Felt & Tarrant Mfg. Co.* v. *United States*, 37 F. 2d 977 (C. Cls.); *cf. Blair* v. *Birkenstock*, 271 U. S. 348; *cf. Marks* v. *United States*, 98 F. 2d 564 (C. C. A. 2d); *cf. Philipsborn* v. *United States*, 53 F. 2d 133 (C. Cls.). Claims discussed in one instance as "erroneous assessments" and in another as "overpayments": *United States* v. *Kales, supra; Wm. J. Friday & Co.* v. *United States*, 61 F. 2d 370 (C. C. A. 3d); *Lucas* v. *United States*, 45 F. 2d 291 (App. D. C.); *Wisconsin Nat. Life Ins. Co.* v. *United States*, 42 F. 2d 316 (C. Cls.); *McCarl* v. *United States ex rel. Leland*, 42 F. 2d 346 (App. D. C.); *Ohio Steel Foundry Co.* v. *United States*, 38 F. 2d 144 (C. Cls.); *Mellon* v. *United States*, 36 F. 2d 609 (App. D. C.); *American Security & Trust Co.* v. *Tait*, 5 F. Supp. 337 (D. Md.); *cf. Union Trust Co.* v. *United States*, 70 F. 2d 629 (C. C. A. 2d).

revenue tax at the rate of 6 per centum per annum.

If it is true that "overpayments" of taxes are different from erroneous or illegal collections of taxes, then there is no authority to be found anywhere in the Internal Revenue Code permitting the payment of interest on the refund of the latter types of collections.[24]

The exaction of interest from the Government requires specific statutory authority (*Rosenman* v. *United States*, 323 U. S. 658, 663) and may only be computed according to the statutory provisions in force at the time of the allowance of a refund or credit (*United States* v. *Boston Buick Co.*, 282 U. S. 476; *United States* v. *Magnolia Co.*, 276 U. S. 160; *Blair* v. *Birkenstock*, 271 U. S. 348).

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[24] *Cf. Huntley* v. *Southern Oregon Sales*, 104 F. 2d 153 (C. C. A. 9th), where in a sequel to the first *Southern Oregon* case the court was driven by the logic of its earlier decision construing Sections 322 (b) and 3313 to hold that interest may not be awarded under Section 615 (a) of the Revenue Act of 1928 on a judgment for taxes which (it had held in the first *Southern Oregon* case) were "erroneously or illegally assessed and collected."

In *Sbarbaro* v. *United States* (N. D. Ill.), decided May 29, 1947 (1947 C. C. H., par. 9284), the District Court reached the conclusion that, although the alleged distinction between overpayment and erroneous assessment is proper as applied to Sections 322 and 3313 it is not applicable to Section 3771 because "it appears that plaintiffs were not indulging in a literal construction of 'overpayment' since judicial interpretation and legislative intent have given the definition which they attribute to it. The definition of any statutory term is conditioned by the intent with which the term is used within the section."

The suggested result would appear to be the reverse of what would be expected. That Congress should do less for the taxpayer who is constrained illegally to pay a tax than for one who pays as a result of his own error or negligence seems to be a distortion of logic and the reverse of what seems fair and equitable.

Prior to 1921 interest was payable on refunds of taxes made by the Commissioner or in suits against the United States. Section 1324 (a) of the Revenue Act of 1921 provided for the allowance of interest on refunds or credits if the taxes were paid "under a specific protest" or "pursuant to an additional assessment" or, if neither, then interest was to be computed from six months after the date of the filing of the refund claim. Section 1019 of the Revenue Act of 1924 changed the wording of this section to permit interest on the refund of "any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, * * *". Substantially the same provision appeared in Section 1116 of the Revenue Act of 1926.[25] Thereafter Section 614 of the Revenue Act of 1928 repealed Section 1116 (a) and provided for the payment of interest "upon any overpayment in respect of any internal-revenue tax * * *".

[25] See S. Rep. No. 52, 69th Cong., 1st Sess., p. 38 (1939-1 Cum. Bull. (Part 2) 332, 360).

The Committee Reports do not expressly explain the change in wording.[26]

However, the House Report (p. 35) described as "the principal change" (and the only one deemed worthy of mention by either the House or Senate Committee) that which required the payment of interest to a date not more than 30 days preceding the refund check. Thus the silence of the Reports is significant, for, if it were intended to exclude so great a number of refunds from the benefit of interest payments, an expression of such intention was in order.[27]

Interest has since 1921 been paid on all refunds, regardless of what caused the payment of such sum by the taxpayer in the first instance. And "it will not do to treat the same transaction as [over] payment and not as [over] payment, which

[26] H. Rep. No. 2, 78th Cong., 1st Sess., p. 35 (1939–1 Cum. Bull. (Part 2) 384, 408); S. Rep. No. 960, 70th Cong., 1st Sess., p. 43 (1939–1 Cum. Bull. (Part 2) 409, 439).

[27] Not a single suggestion of a contrary understanding is to be found in the legislative hearings and other Committee Reports in connection with any of the Revenue Acts. Senate Hearings on Revenue Act of 1924, 68th Cong., 1st Sess., pp. 54–56. *Cf.* House Hearings on Revenue Revision 1924, 68th Cong., 1st Sess., p. 512; Senate Hearings on Revenue Revision 1925, 69th Cong., p. 1009; House Hearings on Revenue Revision 1927–1928, 69th-70th Congresses, pp. 109, 138, 187, 545; S. Rep. No. 1240, 74th Cong., 1st Sess., pp. 12–13 (1939–1 Cum. Bull. (Part 2) 651, 659); H. Conference Rep. No. 1885, 74th Cong., 1st Sess., p. 12 (1939–1 Cum. Bull. (Part 2) 660, 665). See also Report of the Joint Committee on Internal Revenue Taxation (1928), Vol. I, pp. 16–17.

ever favors" the taxpayer. *Cf. Rosenman v. United States, supra,* p. 663.

2. *The jurisdiction of the Tax Court would be curtailed.*—Perhaps an even more important result of the distinction drawn by the court below would be in the limitation it would impose upon the jurisdiction of the Tax Court. In any case where a deficiency in income taxes has been determined and the taxpayer has filed a petition for review, subsection (d) of the very section here in question (Section 322) gives jurisdiction to the Tax Court to find that a taxpayer "has made an overpayment of tax". Appendix, *infra.* The result of the distinction between "overpayment" and "erroneous or illegal collection" drawn in the decision below if applied consistently, would be to limit the Tax Court's jurisdiction to make such findings only to those cases where the excessive payment results from an error made on the return. No jurisdiction would exist in the harsher situation, one which more obviously calls for relief to the taxpayer, where the payment of the tax arose from the Commissioner's erroneous or illegal assessment. Such a serious limitation upon the jurisdiction of the Tax Court could only be justified on the basis of a statutory command in the most express language.[28]

[28] There is no trace of even an indirect suggestion of the need or desirability of such a result in the legislative history. *Cf.* H. Rep. No. 1, 69th Cong., 1st Sess., pp. 13–14 (1939–1

The purpose of investing the Tax Court with jurisdiction of overpayments was to provide a remedy whereby the taxpayer might have his "entire tax liability for the year in question * * * finally and completely settled" in a single proceeding.[29] No possible reason suggests itself therefore for the exclusion from such a proceeding of items paid as a result of an erroneous assessment by the Commissioner. And in practice no such limitation has been recognized.[30]

Cum. Bull. (Part 2) 315, 324); S. Rep. No. 52, 69th Cong., 1st Sess., pp. 25–28 (1939–1 Cum. Bull. (Part 2) 332, 351–352); H. Conference Rep. No. 356, 69th Cong., 1st Sess., pp. 42, 49 (1939–1 Cum. Bull. (Part 2) 361, 370–371, 375); House Hearings on Revenue Revision 1927–1928, 69th–70th Congresses, pp. 100–101; H. Rep. No. 2, 70th Cong., 1st Sess., pp. 24–25, 29–30 (1939–1 Cum. Bull. (Part 2) 384, 400–401, 403–404); S. Rep. No. 960, 70th Cong., 1st Sess., pp. 33, 36–37 (1939–1 Cum. Bull. (Part 2) 409, 432, 434–435); H. Rep. No. 704, 73d Cong., 2d Sess., pp. 35, 37–38 (1939–1 Cum. Bull. (Part 2) 554, 580–581, 582); S. Rep. No. 558, 73d Cong., 2d Sess., pp. 44, 47 (1939–1 Cum. Bull. (Part 2) 586, 620, 622); H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 26 (1939–1 Cum. Bull. (Part 2) 627, 635); H. Rep. No. 1860, 75th Cong., 3d Sess., pp. 49, 69 (1939–1 Cum. Bull. (Part 2) 728, 764, 778).

[29] S. Rep. No. 52, 69th Cong., 1st Sess., pp. 26–27 (1939–1 Cum. Bull. (Part 2) 332, 351–352). *Cf. Ohio Steel Foundry Co.* v. *United States*, 38 F. 2d 144, 145–148 (C. Cls.); *Warren Mfg. Co.* v. *Tait*, 60 F. 2d 982 (D. C. D. Md.).

[30] *U. S. ex rel Girard Co.* v. *Helvering*, 301 U. S. 540; *Greylock Mills* v. *Commissioner*, 9 B. T. A. 1281, affirmed, 31 F. 2d 635 (C. C. A. 2d); *cf. Roslyn Fuel Co.* v. *Commissioner*, 16 B. T. A. 285.

E. *The lower court cases on which the court below relied were erroneously decided*

The distinction drawn by the court below is consistent with certain decisions[21] beginning with *Huntley* v. *Southern Oregon Sales*, 102 F. 2d 538 (C. C. A. 9th). We submit that the *Southern Oregon* case is demonstrably erroneous and that the cases which followed it simply compounded the error.

The *Southern Oregon* case involved a taxpayer corporation which, after payment of the tax, was determined to be wholly exempt,—that is, not required to file a return. The court attached significance to this factor, for in its analysis of Section 252 of the Revenue Act of 1921, the court stated (pp. 541–542) that it believed its construction to be correct because "borne out by the fact that Section 252 applied only to taxpayers required to file returns". The court conjectured that (p. 543):

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[21] *Olsen* v. *United States*, 32 F. Supp. 276 (S. D. Calif.); *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679 (C. C. A. 6th); *In re Tindle's Estate*, 59 F. Supp. 667 (E. D. Pa.), affirmed *per curiam sub nom. Pennsylvania Co. for Insurance on Lives* v. *United States*, 152 F. 2d 757 (C. C. A. 3d); *Godfrey* v. *United States*, 61 F. Supp. 240 (S. D. N. Y.); *Noble* v. *Kavanagh*, 66 F. Supp. 258 (E. D. Mich.), affirmed *per curiam*, 169 F. 2d 104 (C. C. A. 6th); *Sbarbaro* v. *United States* (N. D. Ill.), decided May 29, 1947 (1947 C. C. H., par. 9284). *Contra*, *Central Hanover Bank & Trust Co.* v. *United States*, 67 F. Supp. 920 (S. D. N. Y.); *Fawcett* v. *United States*, 70 F. Supp. 742 (N. D. Calif.).

> The distinction made had a logical basis. It would take less time to discover errors in returns required to be filed than it would to discover whether persons had correctly considered themselves exempt and not required to file returns at all. In the former case, information was at hand, while in the latter it must be sought.[22]

The reverse explanation would seem more probable. Congress might more understandably have permitted taxpayers a longer time to discover errors of "mere overpayments"—which errors would be less likely to be called to the attention of, and be subject to reexamination by, a taxpayer—as compared with "erroneous assessments"—the payment of which would be involuntary and which would evoke the opposition of the taxpayer.

The analysis in the *Southern Oregon* case by the Circuit Court of Appeals of the statutory development does not include any mention of the Mellon letter or the House Committee's statement on the reason for the changes made by Section 1 of the Act of March 4, 1923, which we have discussed *supra*, pp. 22–26. This may explain the failure of the *Southern Oregon* opinion to appreciate the significance of the 1923 Act or the 1924 revision. The court's analysis (pp. 539–543) did nothing except to demonstrate the exist-

[22] Under this theory the limitation of Section 3228 of the Revised Statutes, if applied to income taxes at all, ought to be applied only where no return is required.

ence of an apparent conflict between Section 252 of the 1921 Act and Section 3228, Revised Statutes, as amended. But it found nothing in the legislative history to resolve that conflict and its conclusion rests on the merest conjecture.

As shown, the "logical basis" referred to above is not supported by the logic of the situation; nor, as will appear, can it rest on the actual statutory periods involved.

If the Government's view is the correct one, a comparison between the two sections cannot be made (until the 1924 Act). Since the periods were measured in one section from the due date of the return and in the other from the date of payment, either section may have given a longer statutory period depending on the date of assessment and payment. If, on the other hand, the distinction drawn below between "overpayments" and "erroneous assessments" is correct then the time given for the filing of claims was, until the Revenue Act of 1924, a *longer* period for the so-called overpayments under Sections 252 and 284 than for "erroneous assessments" under Section 3228 of the Revised Statutes.

Section 14 (a) of the Revenue Act of 1916 had removed the statute of limitations completely from income tax claims whereas the two-year provision in Section 3228 remained the same. In Section 252 of the Revenue Act of 1918, the limitation period became five years from the time the return was due as compared with the two-year

(from accrual of the cause of action) provision of Section 3228. The Revenue Act of 1921 reenacted Section 252 without material change although the two-year period of Section 3228 was extended by Section 1316 to four years from the payment of the tax. The Act of March 4, 1923, as already shown, added the two-year period from the date of payment to Section 252. In the Revenue Act of 1924 the periods of limitation were four years from payment of tax under both Section 281 of that Act and Section 3228 as amended. Not until the Revenue Act of 1926 did the overpayment section in respect of income taxes (Section 284 of the 1926 Act) provide for a three-year period as compared with the four-year period of Section 3228. Thus, in each of the Revenue Acts apparently regarded by the *Southern Oregon* opinion as crucial and as providing a decisive answer, the so-called "overpayment" section actually provided for *more* time in which to file refund claims than did the "erroneous assessment" section, and not, as the opinion reasons, "less time" to discover overpayments.[33] Therefore, the conclusion cannot be sustained either on the analysis of the legislative history or on its "logical basis".

In *United States* v. *Lederer Terminal W. Co., supra,* the Sixth Circuit relied on the statutory

[33] Compare the last quoted sentence of the Senate Finance Committee Report explaining the 1923 amendment; *supra,* p. 25.

analysis of the *Southern Oregon* case, but did not accept the restricted view implicit in the logical basis there advanced. The court said (p. 681):

> The fact that in the cited cases *no tax whatever* was due from the taxpayer while in the instant case *no additional tax was due* is deemed immaterial.
>
> * * * * * * * * *
>
> The essential distinction is that Section 322 relates to *mere overpayment*, while Section 3313 properly applies to *erroneous or illegal assessment* and collection.

The court then advanced a new "logical basis" for the distinction between the two statutes (p. 681):

> Congress evidently considered that less time would be required for the discovery of errors in tax returns resultant from miscalculations or mere overpayment than would be required to ascertain the erroneous or illegal nature of an assessment. Hence, the inference is logical that Congress intended to allow the taxpayer a longer time to determine whether he had been erroneously or illegally assessed than would be permitted him for the discovery of a mere overpayment of taxes, assessed and collected upon a correct or legal basis. This would explain the longer time limitation provided by Congress in Section 3313 than that allowed in Section 322 of the Internal Revenue Code.

For the reasons stated, this explanation is as unsatisfactory as that given by the *Southern Oregon* opinion.

Olsen v. *United States, supra,* was decided by a District Court in the Ninth Circuit, and the court merely relied on the *Southern Oregon* case.

The decision of the District Court in *In re Tindle's Estate, supra,* was affirmed by the Circuit Court of Appeals without opinion. The District Court, in reaching its decision, relied on the same group of cases which the instant taxpayer cites, so the decision adds nothing of real substance to the weight behind the decision of the question in those cases.[34] Moreover, the taxes involved were estate taxes governed by Section 319 (b) of the Revenue Act of 1926, now Section 910, Internal Revenue Code. This section specifically refers to taxes erroneously or illegally assessed or collected, thus making it impossible to sustain the conclusion that such taxes are governed by Section 3313 of the Code. The District Court decision on this question is, therefore, patently wrong and wholly unreliable as a precedent.

In *Godfrey* v. *United States, supra,* the District Court denied the Government's motion to dismiss

[34] Any significance the case might have had is also weakened by the presence of a question whether a rider attached to the tax return was an informal claim for refund which would have been timely and would have been cured by the formal claim for refund later filed. It was this question which formed the principal ground for debate in the case.

based upon the limitation question, but the taxpayer subsequently voluntarily abandoned the case on the merits. The court there accepted the analysis of the limitations statutes in the *Southern Oregon* case and simply followed that decision. The same may be said of *Noble* v. *Kavanagh* and *Sbarbaro* v. *United States, supra.*

These cases so completely rely on the *Southern Oregon* and *Lederer* cases that they add little or nothing to the weight of those cases in support of the taxpayer's contention.

F. The doctrine of legislative acquiescence, relied on below, is inapplicable to this case

The court below stated (R. 22) that Congress should be regarded as having approved the interpretation of the statutes by the *Southern Oregon* case (decided March, 1939) and those which followed, in view of the fact that Congress has convened from time to time and has amended Section 322 without disapproving that interpretation. Although the doctrine of legislative acquiescence may have its place, it is nevertheless only an aid to statutory construction (cf. *Helvering* v. *Reynolds,* 313 U. S. 428, 432), and is not to be applied rigidly in disregard of plain facts. And the plain facts here are that the *Southern Oregon* decision was merely that of an intermediate court, that the Government did not ask for certiorari on this issue in the absence of a conflict

until now because the question had not assumed its present importance, and that since the *Southern Oregon* decision seemed plainly wrong, it was felt more desirable to litigate the issue further than to seek legislative correction. The word "overpayment" appears in the statute in numerous places, and an attempted legislative correction might not be as satisfactory as a reversal of an erroneous decision.

Surely, every time that a circuit court of appeals hands down an erroneous decision, the Treasury should not be faced with the necessity of applying for certiorari or of asking for legislative relief. It should be permitted the choice of litigating the issue further in other cases, as it has done in the present situation, without being faced with the contention that the erroneous decision has meanwhile become imbedded in the law. Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 119–121; *Girouard* v. *United States*, 328 U. S. 61, 69–70; cf. *United States* v. *Underwriters Assn.*, 322 U. S. 533, 556.

The decisions cited by the court below applied the doctrine of legislative acquiescence in situations where there had been a continued and consistent judicial expression for long periods of time.[35] None of them involved such a relatively

[35] *Sessions* v. *Romadka*, 145 U. S. 29, 41–46 (26 years); *Manhattan Prop.* v. *Irving Tr. Co.*, 291 U. S. 320, 336 (more than 34 years); *United States* v. *Elgin, J. & E. Ry.*, 298 U. S. 492, 500 (27 years); *Missouri* v. *Ross*, 299 U. S. 72, 75 (30

short period as the present case, where the plain facts negative the possibility that the matter was called to the attention of Congress, wholly apart from the ambiguity of legislative inaction even where the matter is actively placed before it. The rule, if it may be called such, should not be regarded as applicable unless the decisions are in fact made known to Congress (cf. *Manhattan Prop.* v. *Irving Tr. Co.*, 291 U. S. 320, 334), or unless such knowledge may be inferred from the importance or notoriety of the case. Neither of these circumstances is here present. As Judge Huxman said in his dissenting opinion below (R. 27), no reason is apparent for the presumption—

> that the *Huntley* decision, which is approximately eight years old and which relates to a minor detail in the administration of the income tax law, came to the attention of Congress * * * especially so since during all that time Congress was occupied with matters of greatest importance to our national existence.

If the doctrine of Congressional approval by re-enactment of the revenue laws is applicable, it ought to be applied as an adoption of the Treasury Regulations and long-standing rulings (see pp. 33–36, *supra*) rather than the *Southern Oregon* decision.

---

years); *Electric Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14 (42 years). See also *United States* v. *Ryan*, 284 U. S. 167, 174–175 (more than 60 years); *B & O Railroad* v. *Baugh*, 149 U. S. 368, 372 (50 years).

CONCLUSION

The decision below is erroneous and should be reversed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ARNOLD RAUM,
HELEN R. CARLOSS,
LEE A. JACKSON,
S. WALTER SHINE,
Special Assistants to the Attorney General.

OCTOBER, 1947

Revenue Act of 1916, c. 463, 39 Stat. 756:

TITLE I—INCOME TAX

* * *

ASSESSMENT AND ADMINISTRATION

SEC. 14. (a) * * * upon the examination of any return of income made pursuant to this title * * * [or under the Corporation Excise Tax Act of August 5, 1909, or the Tariff and Revenue Act of October 3, 1913] * * * if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

TITLE II—INCOME TAX

* * *

REFUNDS

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, * * * [the Corporation Excise Tax Act of August 5, 1909, the Tariff and Revenue Act of October 3, 1913, the Revenue Act of 1916, as amended, or the Revenue Act of 1917] * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of Section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

Revenue Act of 1921, c. 136, 42 Stat. 227:

TITLE II—INCOME TAX

* * *

REFUNDS

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, * * * [the Corporation Excise Tax Act of August 5, 1909, the Tariff and Revenue Act of October 3, 1913, the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918] * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *

The Act of March 4, 1923, c. 276, 42 Stat. 1504:

* * *

SEC. 252. (a) That if, upon examination of any return of income made pursuant to this Act, * * * [the Act of August 5, 1909, the Act of October 3, 1913, the Revenue Act of 1916, as amended, or the Revenue Acts of 1917 or 1918] * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer: * * *

(b) Where a tax has been paid under the provisions of section 221 or 237 in excess of that properly due, any refund or credit made under the provisions of this section or section 3228 of the Revised Statutes shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

Revenue Act of 1924, c. 234, 43 Stat. 253:

TITLE II—INCOME TAX

* * *

OVERPAYMENTS

SEC. 272. If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281.

* * *

CREDITS AND REFUNDS

SEC. 281. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act * * * [the 1909-1921 taxing Acts inclusive] * * *, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c) and (e) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE II—INCOME TAX

* * *

OVERPAYMENTS

SEC. 272. If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 284.

* * *

CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act * * * [the 1909-1924 taxing Acts inclusive] * * * the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

TITLE I—INCOME TAX

* * *

SUPPLEMENT O—OVERPAYMENTS

SEC. 321. OVERPAYMENT OF INSTALLMENT.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

SEC. 322. REFUNDS AND CREDITS.

(a) **Authorization.**—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) **Limitation on Allowance.**—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * *

(d) OVERPAYMENT FOUND BY BOARD.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount, when the decision of the Board has become final, be credited or refunded to the taxpayer. * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

TITLE I—INCOME TAX

* * *

SUPPLEMENT O—OVERPAYMENTS

SEC. 321. OVERPAYMENT OF INSTALLMENT.

[Identical with Section 321 of the Revenue Act of 1928.]

SEC. 322. REFUNDS AND CREDITS.

(a) **Authorization.**

[Identical with Section 322 (a) of the Revenue Act of 1928.]

(b) **Limitation on Allowance.**—

[Identical with Section 322 (b) of the Revenue Act of 1928.]

* * *

(d) **Overpayment found by Board.**—

[First sentence identical with first sentence of Section 322 (d) of the Revenue Act of 1928.]

Revenue Act of 1934, c. 277, 48 Stat. 680:

TITLE I—INCOME TAX

* * *

SUPPLEMENT O—OVERPAYMENTS

SEC. 321. OVERPAYMENT OF INSTALLMENT.

[Identical with Section 321 of the Revenue Act of 1932.]

SEC. 322. REFUNDS AND CREDITS.

(a) **Authorization.**—

[Identical with Section 322 (A) of the Revenue Act of 1932.]

(b) **Limitation on Allowance.**—

(1) PERIOD OF LIMITATION.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

* * *

Internal Revenue Code:

CHAPTER 1—INCOME TAX

* * *

SUPPLEMENT O—OVERPAYMENTS

* * *

SEC. 321. OVERPAYMENT OF INSTALLMENT.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayments shall be credited or refunded as provided in section 322.

SEC. 322. REFUNDS AND CREDITS.

(a) **Authorization.**—

(1) OVERPAYMENT.—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * *

(b) **Limitation on Allowance.**—

(1) PERIOD OF LIMITATION.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

(B) If a claim was filed, and (i) no return was filed, or (ii) if the claim was not filed within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the filing of the claim.

(C) If no claim was filed and the allowance of credit or refund is made within three years from the time the return was filed by the taxpayer, during the three years immediately preceding the allowance of the credit or refund.

(D) If no claim was filed, and (i) no return was filed or (ii) the allowance of the credit or refund is not made within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the allowance of the credit or refund.

Revised Statutes:

SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date.

SEC. 1316. That section 3228 of the Revised Statutes is amended to read as follows:

"SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). * * *

TITLE X.—GENERAL ADMINISTRATIVE PROVISIONS

* * *

REFUNDS

* * *

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed."

TITLE XI.—GENERAL ADMINISTRATIVE PROVISIONS

* * *

REFUNDS

* * *

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed."

TITLE IV—ADMINISTRATIVE PROVISIONS

* * *

SEC. 619. MINOR ADMINISTRATIVE AMENDMENTS.

* * *

(c) Section 3228 of the Revised Statutes, as amended by section 1112 of the Revenue Act of 1926, is amended by striking out "except as provided in Sections 284 and 319 of the Revenue Act of 1926" and inserting "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes".

TITLE IX—ADMINISTRATIVE AND GENERAL PROVISIONS

* * *

SEC. [illegible]. REFUNDS OF MISCELLANEOUS TAXES.

(a) Subsection (a) of section 3228 of the Revised Statutes, as amended, is amended by adding at the end thereof the following:

"The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim; or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

"(b) The amendment made by subsection (a) of this section to section 3228 of the Revised Statutes shall not bar from allowance a claim for refund filed prior to the enactment of this Act which but for such enactment would have been allowable."

(d) **Overpayment found by Board.**

[First sentence identical with first sentence of Section 322 (d) of the Revenue Act of 1932.]

[Sections 321 and 322 (a) and (b) and the first sentence of (d) of the **Revenue Act of 1936**, c. 690, 49 Stat. 1648, and of the **Revenue Act of 1938**, c. 289, 52 Stat. 447, are identical with the corresponding sections of the Revenue Act of 1934.]

* * *

(d) OVERPAYMENT FOUND BY BOARD.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer.

* * *

CHAPTER 28—PROVISIONS COMMON TO MISCELLANEOUS TAXES

SUBCHAPTER A—GENERAL PROVISIONS

* * *

SEC. 3313. PERIOD OF LIMITATION UPON REFUNDS AND CREDITS.

All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 71

H. C. JONES, Collector of Internal Revenue,
Petitioner,

VERSUS

THE LIBERTY GLASS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

EARL FOSTER,
Oklahoma City, Oklahoma,
Attorney for Respondent.

NOVEMBER, 1947.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 71

H. C. JONES, Collector of Internal Revenue,
Petitioner,

VERSUS

THE LIBERTY GLASS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the District Court (R. 12-17) is reported in 66 Fed. Supp. 254. The opinion of the Circuit Court of Appeals (R. 20-23) and the dissenting opinion (R. 23-27) are reported in 159 Fed. (2d) 316.

Question Presented

The sole and only question presented in this case is whether the filing of respondent's claim for refund is gov-

erned by the two-year statute of limitations, as provided in Section 322 of the Internal Revenue Code, which governs "over-payment," or by the four-year statute, as provided in Section 3313 of the Internal Revenue Code, respondent's claim being for internal revenue tax "erroneously or illegally assessed or collected."

The question as presented on Page 2 of petitioner's brief is definitely not the real question and evades the real issue.

Statement

The material facts are set out in the agreed stipulation (R. 11-12) and are in substance as follows:

In March, 1939, the respondent filed its income tax return for the year 1938 and paid the amount shown thereon; in November, 1939, Thomas S. Depew, Internal Revenue Agent, made an examination of the books and assessed an additional tax in the sum of $158.53, which was paid; in November, 1940, Carl E. Latta, a revenue agent, made an additional examination of respondent's books and assessed an additional tax in the sum of $6,640.81, which was paid on March 8, 1941; in making the assessment last above mentioned, no consideration was given to respondent for retirement of indebtedness during the year 1938, and same resulted in an illegal tax against respondent in the sum of $1,053.49, which was erroneously and illegally assessed and collected; that claim therefor was filed on March 30, 1944, and was denied by the Commissioner of Internal Revenue on June 24, 1944, for the

sole reason that it was not filed within the proper time, and "The decision in the case of *U. S.* v. *Lederer Terminal Warehouse Company*, cited by you, is not being followed by the Bureau" (R. 9).

Complaint was filed in the District Court (R. 1-9). Answer and Motion to Dismiss was filed (R. 9-10). Opinion was filed (R. 12-17) and judgment entered (R. 17-18).

Appeal to the Circuit Court of Appeals for the Tenth District was perfected by the Government, and judgment of the District Court affirmed (Opinion, R. 20-23). Dissenting opinion by Justice Huxman (R. 23-27).

Summary of Argument

It is the respondent's contention that the judgment of the District Court and the Circuit Court of Appeals in this case is correct for the following reasons:

(1) That the provisions of Section 3313 and Section 322 of the Internal Revenue Code are clear and unambiguous, and clearly show that the claim is governed by Section 3313.

(2) That all of the District Courts and Circuit Courts of Appeals which have passed on the question here presented are unanimous in their opinion that the claim is governed by Section 3313.

(3) That Congress has approved the judicial interpretations made by the various District Courts and Circuit Courts of Appeals.

(4) That the Government through the Internal Revenue and Justice Departments acquiesced in the interpretation made by the various District Courts and Circuit Courts of Appeals for a period of approximately eight years.

(5) That the legislative history supports the conclusions reached by the District Court and Circuit Court of Appeals in this case, and many other District Courts and Circuit Courts of Appeals, although legislative history is not necessary or proper under the facts and conditions in this case.

(6) That all tax laws are construed in favor of the taxpayer, which is especially true in construing statutes of limitations.

ARGUMENT AND AUTHORITIES

We quote the two statutes above referred to:

Title 26, U.S.C., Section 322, Subsections (a) (1) and (b) (1) reads as follows:

"*(a) Authorization (1) Overpayment.* Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess profits tax, or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"*(b) Limitation on Allowance. (1) Period of limitation.* Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

Title 26, U.S.C., Section 3313, reads as follows:

"All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any

sums alleged to have been excessive or in any manner wrongfully collected must, *except as otherwise provided by law in the case of income, war-profits, excess profits, estate, and gift taxes*, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes), shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund" (Emphasis ours).

It is clear from a reading of the two statutes that the word "overpayment" used in Section 322 has a different meaning from the words "erroneously or illegally assessed or collected" used in Section 3313. As will be hereinafter shown, practically all courts have so held.

It is the chief contention of the Government that Section 322 includes all refunds of any kind or nature pertaining to income tax, war-profits, or excess-profits, and that the intention of the Congress in drafting Section 3313 was to entirely eliminate from that section anything pertaining to income and excess-profits tax. Certainly if that had been the intention, Congress would not have used the expression in Section 3313 "except as otherwise provided by law."

Had it been the intention to eliminate all of the provisions concerning these particular taxes, is it not reasonable to assume that Congress would have used an expression in substance as follows: "except that this section shall not affect in any way income, war-profits, excess-profits, estate, or gift taxes."

The language of the statute clearly indicates that Section 3313 will apply except as otherwise provided.

It is significant that Section 322 refers throughout to "overpayments." Not once is the word "collection" or the word "erroneous" or the word "illegal" used, while Section 3313 refers throughout to "collections," to assessments "erroneously or illegally" made, sums "wrongfully collected," so in the language of the statutes the distinction is clearly drawn between overpayments *and illegal collections.*

It is the contention of the Government that the word "overpayment" as used in Section 322 is exactly synonymous with the words "erroneously or illegally assessed or collected" as used in Section 3313 The argument goes to great length to show that there can be no possible distinction.

Is this argument logical? If any taxpayer would approach a tax collector and say, for example, "Last year I overpaid my taxes," and another would say, "Last year you erroneously and illegally assessed and collected a tax against me," everyone would agree that the two men were talking about an entirely different situation. One was a mere mistake in a legally assessed tax. The other was an unlawful and erroneous assessment made and collected. Materially different.

This contention is supported by the lower courts in this case. The opinion of the District Court states:

"As I view these statutes, there is no ambiguity presented here. The purpose of each of them is very clear.

Section 322 deals with claims for credits or refunds claimed to have been overpayment of any tax legally imposed, while Section 3313 deals with claims for credits or refunds claimed to have been paid *on sums alleged to have been erroneously or illegally assessed or collected, or claims for any sum alleged to have been excessive or in any manner wrongfully collected.* The statute (Section 3313) clarifies its intent by providing these words: 'except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes.' Clearly this must refer to Section 322 which provides a period of limitation on claims for *overpayment* on such taxes, of *three years* from the time the tax was paid. The claim of the plaintiff is for a sum alleged to have been erroneously or illegally assessed, and clearly is governed by the limitation so provided in Section 3313" (Emphasis the Court's) (R. 16).

The Circuit Court of Appeals, in affirming the District Court in this case, states as follows:

"By its express terms, Section 322 has application to claims for overpayment of income, war-profits, or excess-profits taxes. It was intended to govern overpayments resulting from errors occurring in the preparation of the return, or in other somewhat similar circumstances. And by its express language, Section 3313 has application to claims for the crediting or refunding of payments of internal revenue erroneously or illegally assessed. It was intended to govern where a deficiency assessment is erroneously or illegally made under pretended color of legal authority. The claim submitted by this taxpayer was not for a refund of an overpayment arising out of an error or mistake in the preparation of the return. Nothing of that kind entered into the situation. It was for money paid in liquidation of a deficiency assessment erroneously and illegally made under pretended color of legal authority. Therefore the time for the filing of the claim was fixed by Section 3313. *Huntley* v. *Southern Oregon Sales, Inc.*, 102 Fed. (2d) 538; *United States* v. *The Lederer*

Terminal Warehouse Co., 139 Fed. (2d) 679; *Pennsylvania Co. v. United States*, 152 Fed. (2d) 757, affirming 59 Fed. Supp. 667. See also *Olsen v. United States*, 32 Fed. Supp. 276; *Godfrey v. United States*, 61 Fed. Supp. 240; *Noble v. Kavanaugh*, 66 Fed. Supp. 258."

The other cases passing upon this matter seem to have all arrived at the same conclusion. In *Huntley v. Southern Oregon Sales, Inc.*, 102 Fed. (2d) 538, the court states: "This distinction had a logical basis." In *United States v. Lederer Terminal Warehouse Co.*, *supra*, the court found: "The distinction between the two statutes of limitations, Section 322 and Section 3313, is that the first mentioned is by its terms applicable to overpayment of income * * * while the latter section relates to internal revenue taxes erroneously or illegally assessed or collected." And also in the case of *Pennsylvania Company v. United States*, 59 Fed. Supp. 667, affirmed in 152 Fed. (2d) 757, the court says: "It seems clear, however, that the refund sought is not for an 'overpayment' in the sense used as the basis for the distinction drawn * * * All of these cases had under consideration the meaning of 'overpayment' as compared with 'erroneously or illegally assessed or collected,' as used in the statutes above quoted. All courts seem to hold that the words have a clear meaning, and need no investigation in addition to the reading of the statutes themselves.

It appears to be a settled rule that when words in a statute are sufficient in and of themselves to determine the purpose of the legislation, no outside investigation is needed.

In *United States* v. *American Trucking Association*, 310 U.S. 534, this Court held as follows:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results*, however, this Court has looked beyond the words to the purpose of the act" (P. 543) (Emphasis ours).

In support thereof this Court cites the following cases: *Taft* v. *Commissioner*, 304 U.S. 351, 359; *Helvering* v. *City Bank Co.*, 296 U.S. 85, 90; *Wilbur* v. *United States*, 284 U.S. 231, 237; *Crooks* v. *Harrelson*, 282 U.S. 55, 60; *U. S.* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 278; *Caminetti* v. *United States*, 242 U.S. 470, 490; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U.S. 184, 199; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 332; *Sorrells* v. *United States*, 287 U.S. 435, 446; *United States* v. *Ryan*, 284 U.S. 167, 176.

Attention is especially directed to the language in the case of *United States* v. *American Trucking Association*, *supra*, as follows:

> "When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the legislation."

This clearly states the unanimous holdings of this Court. It is only when the words of a statute lead to "absurd or futile results" that this Court or the lower courts should "look beyond the words" to determine the intent.

Surely no one would say that to grant a taxpayer four years within which to file a claim for refund instead of two years, leads to "absurd or futile results." The interpretation of these statutes by the various courts certainly is not "absurd or futile."

It is most interesting to note that the Department of Justice concurred. As late as 1945 able attorneys for the Government were of the opinion that Section 3313 was clear and unambiguous. These able attorneys were more positive on this point than the District Court or the Circuit Court of Appeals in the instant case.

In the brief of the United States, filed in the case of *In re: Tindle's Estate—Pennsylvania Company for Insurance on Lives* v. *United States*, 152 Fed. (2d) 757, then pending in the Circuit Court of Appeals, Third Circuit, it is stated on Page 10 as follows:

> "We submit that the decisions relied upon are not correct because Section 3313 of the Internal Revenue Code especially exempts from its application income tax, war-profits, excess-profits, estate and gift taxes. *The statute is clear and unambiguous; and resort to legislative history to aid it in its interpretation was improper. Helvering* v. *City Bank Co.*, 296 U.S. 85, 89" (Emphasis ours).

In the quoted statement, the Government's counsel were discussing cases that had approved the legislative history set out in the *Huntley* v. *Southern Oregon Sales Company case, supra*, which is much discussed by the Government and will be referred to later herein.

From 1939 to 1945, the Government's attorneys took the position that legislative history in this case was not only

unnecessary but was "improper." But when the case of *The Liberty Glass Company* was filed in 1946, it became the principal issue to be considered.

Section 322 provides for two things: First, there must be an overpayment; and second, the overpayment must be of a "tax imposed by this chapter" of the revenue laws; and similar provisions appear in corresponding sections of the revenue acts.

The second condition in Section 322 seems to have been entirely ignored by the Government's attorneys. It is evident that when Congress limited overpayments to "any tax imposed by this chapter" it intended to refer to a tax legally imposed and not to an erroneous or illegal assessment or collection.

It appears from the above that it would be unnecessary to give this matter further consideration. The fact that the Attorney General's office itself has taken absolutely divergent and contradictory positions on this subject is sufficient for this Court to give great weight to the unbiased and unprejudiced opinions of the District Courts and Circuit Courts of Appeals, which will be hereinafter referred to.

ALL CASES SUPPORT LOWER COURT'S DECISION

The Circuit Court of Appeals in this case made the following most significant statement:

> "Conceding that the cases just cited are against his contention and expressly challenging their correctness, it is the argument of the collector that by the exceptive

provision contained in Section 3313 a claim of this kind is excluded from that section. * * *" (R. 22).

The cases referred to by the Circuit Court are as follows:

Huntley v. *Southern Oregon Sales, Inc.*, 102 Fed. (2d) 538;
United States v. *The Lederer Terminal Warehouse Co.*, 139 Fed. (2d) 679;
Pennsylvania Co. v. *United States*, 152 Fed. (2d) 757, affirming 59 Fed. Supp. 667;
Olsen v. *United States*, 32 Fed. Supp. 276;
Godfrey v. *United States*, 61 Fed. Supp. 240;
Noble v. *Kavanaugh*, 66 Fed. Supp. 258 (E. D. Mich.), affirmed 169 Fed. (2d) 104 (C.C.A., 6th).

In addition, the following cases have been decided since that opinion was handed down and are to the same effect:

Noble v. *Kavanaugh*, 169 Fed. (2d) 104, (C.C.A., 6th);
Sbarbaro v. *United States* (ND Ill.), decided May 29, 1947, 1947 C.C.H., Par. 9284.

In *Huntley* v. *Southern Oregon Sales, Inc., supra*, the Court had before it the identical question here presented, with the sole exception that in that case the taxpayer was not required to file any return, and after an exhaustive review of the legislative history of the two Acts, the Court came to the conclusion that in overpayment of income tax the two-year statute applies, while in the case of taxes erroneously or illegally assessed or collected, the four-year statute applies, and then the Court states:

"The distinction made had a logical basis. It would take less time to discover errors in returns required to

be filed than it would to discover whether persons had correctly considered themselves exempt and not required to file returns at all. In the former case, the information was at hand, while in the latter it must be sought."

Here it plainly appears that the Court reached the same conclusion as did the District Court and the Circuit of Appeals in the instant case: that a distinction between *overpayment* of tax, and *illegally assessed or collected* tax is logical: that it is clear on its face: but in addition, this Court goes exhaustively into legislative history, on which the petitioner in this case alone relies, and finds that from this history it also clearly appears that Congress intended the distinction to be made.

In this *Huntley case* the Solicitor General of the United States formally announced that no petition for *certiorari* would be filed (*Prentice-Hall Federal Tax Service*, 1939, Vol. 1, Sec. 4.35).

The case of *Olsen* v. *United States*, *supra*, a California case decided March 19, 1940, comes to the same conclusion, and holds that the four-year statute and not the two-year statute governs. It will be observed that in this case a return was required which was not true in the *Huntley* v. *Southern Oregon Sales case*, and demonstrates the fallacy of the argument in appellant's brief that if the four-year statute should apply at all, it should apply only to cases where no returns are required, as was the fact in the *Huntley case*.

The case of *Godfrey* v. *United States*, *supra* (D.C., SD., NY., December 19, 1940), holds that the taxpayer's

claim for refund was not based on overpayment but was an erroneous and illegal assessment, and that the four-year statute of limitations under Section 3313 controlled.

In *United States* v. *Lederer Terminal Warehouse Company, supra* (C.C.A., 6th Circuit, November 30, 1943), the same conclusion was reached as in the other cases above cited. However, this case is in point with the case at Bar. In affirming the decision of the District Court, the Court said:

> "The conclusion which has been reached is in consonance with *Huntley* v. *Southern Oregon Sales, Inc.*, 9 Cir., 102 Fed.(2d) 538, wherein Judge Haney detailed legislative history pertinent here. See also *Olsen* v. *United States*, D.C. 32 Fed. Supp. 276. The fact that in the cited cases *no tax whatever* was due from the taxpayer while in the instant case *no additional tax* was due is deemed immaterial.
>
> "The distinction between the two statutes of limitation, Section 322 and Section 3313, is that the first mentioned is, by its terms, applicable to the *overpayment* of income, war-profits, or excess-profits taxes; while the latter section relates to internal revenue taxes *erroneously or illegally assessed or collected*, or to excessive payments or wrongful collections of all other taxes, except as otherwise provided by law in the matter of income, war-profits, excess-profits, estate and gift taxes. The essential distinction is that Section 322 relates to *mere overpayment*, while Section 3313 properly applies to *erroneous or illegal* assessment and collection.
>
> "If two statutes present ambiguities, a reasonable interpretation should be adopted by the courts which will give consistent effect to the apparent intention of Congress. Statutes should not be read literally when such reading leads to absurd results. They should be given a reasonable application consistent with their

words and with the legislative purpose.' *Haggar Company* v. *Helvering*, 308 U.S. 389, 394, 60 S. Ct. 337, 339, 84 L. ed. 540.

"Congress evidently considered that less time would be required for the discovery of errors in tax returns resultant from miscalculations or mere overpayment than would be required to ascertain the erroneous or illegal nature of an assessment. Hence, the inference is logical that Congress intended to allow the taxpayer a longer time to determine whether he had been erroneously or illegally assessed than would be permitted him for the discovery of a mere overpayment of taxes, assessed and collected upon a correct or legal basis. This would explain the longer time limitation provided by Congress in Section 3313 than that allowed in Section 322 of the Internal Revenue Code" (Emphasis the Court's).

We call special attention to the holding in this case:

"The fact that in the cases cited *no tax whatever* was due from the taxpayer, while in the instant case *no additional tax* was due is deemed immaterial" (Emphasis the Court's).

In the case of *Pennsylvania Company* v. *United States*, *supra*, the Court again holds that the four-year statute is applicable. In that case the Court said:

"It seems clear, however, that the refund sought is not for an 'overpayment' in the sense used as the basis for the distinction drawn, merely because plaintiff admittedly owed and paid some estate tax. The refund was rather for a refund sought to be imposed as an estate tax, but held by the Supreme Court not to have been levied at all under the statute in question, and *hence erroneously and illegally assessed*. The reasoning of the Circuit Court of Appeals for the Sixth Circuit in the excerpts from its opinion quoted above clearly brings the present claim under the general statute, Section 3228(a) of the Revised Statutes as Amended (I.R.C., 3313)."

> "I am inclined to follow the *unanimous* authorities bearing on this question and to hold that plaintiff's claim for refund, filed within four years from the time of the payment of the tax, was timely and permits the present action" (Emphasis ours).

Noble v. *Kavanaugh*, *supra* (D.C., E.D. So. Div., Mich.), involves the same question here presented. In the opinion the District Court pointed out:

> "Defendant has filed an exhaustive brief, containing among other things the legislative history of Sections 3313 and 322 in an attempt to show that the case of *U. S.* v. *Lederer Terminal Warehouse* as well as the other cases on which it relies, have been decided incorrectly."

Then apparently after a thorough consideration of the entire matter, he comes to the same conclusion as the District Court in the instant case. This case affirmed in 169 Fed. (2d) 104 (C.C.A., 6th).

Sbarbaro v. *United States* (N.D., Ill.), decided May 29, 1947, (1947 C.C.H., Par. 9284; also P.H. Federal Tax Service 72485), is a very recent case directly in point. In this case the Commissioner of Internal Revenue and the Department of Justice made the same contentions as here; that the decisions above mentioned in this brief are "unsound and should not be followed, since they are based on the erroneous assumption that 'overpayment' of tax and 'erroneously or illegally assessed and collected' taxes are not synonymous terms, and (1) would make an orderly, fair and equitable administration of the internal revenue laws impossible resulting in injustice, confusion and absurdities, (2) there is nothing in the legislative history of the per-

tinent provisions of the statute that reasonably may be said to indicate Congress intended that any but the ordinary and commonly understood meaning should be attributed to the terms employed. It is further contended by the Commissioner that Section 3313 is applicable only to Sub-title B relating to Miscellaneous Taxes and is different from that provided in Section 322 applicable to Sub-title A relating to income, estate and gift taxes since in the latter the taxes are subject to the jurisdiction of the Tax Court of the United States, whereas the former are not so subject" *(Prentice-Hall, 72,775)*.

It is quite apparent from the above that all of the contentions made here were made in that case in substantially, if not exactly, the same terms and in the same manner. No doubt the same exhaustive briefs were filed by the Government. Yet that court, applying reason and logic and following the uniform holding of all other courts, held as follows:

> "The two considered sections of the Act must be read in the light of their purpose for the convenience of government officials in passing upon claims and not entrap unwary taxpayers. The rule to be adopted should be a reasonable one and it seems to this court that the expression of the court in the *Lederer case* is one based on fairness and logic. This court follows the aforementioned authorities bearing on this question and holds that plaintiffs' claim for refund, based on an erroneous assessment and collection of income tax is filed within the period specified by Section 3313."

We are not informed as to whether or not this case has been appealed.

It was contended in the court below, and repeated in the Government's brief here, that the case of *Central Hanover Bank and Trust Company* v. *United States*, 67 Fed. Supp. 920 (S.D., N.Y.), and *Fawcett* v. *United States*, 70 Fed. Supp. 742 (N.D., Calif.), are *contra* to the holdings in the above case. An examination of those cases clearly discloses that this contention is erroneous.

In the case of *Central Hanover Bank and Trust Company* v. *United States* the court had under consideration overpayment of taxes caused by computation, and therefore under the plain provisions of the statute and all the decisions, would be controlled by Section 322. The court held that it did not come within the provisions of Section 3801 (the section being construed in that case) and therefore the taxpayer was entitled to recover.

Also this case was decided by the same court as the case of *Godfrey* v. *United States, supra*. It is clear that that court would not have overruled itself without making mention of the same.

The case of *Fawcett* v. *United States, supra*, is likewise in point, but it is indeed interesting because the court adopted "the rule" set out in the *Huntley* v. *Southern Oregon Sales case, supra*, on which the respondent here and all the courts rely, and which the Government's attorney contends is clearly wrong. We quote from that opinion:

> "The *Huntley case* is thus clear authority for *the rule* that where a tax statute provides a specific limitations period within which claims for refund of an overpayment can be filed, such limitations period is not applicable to a claim for refund of an illegally or er-

> roneously assessed tax. It would seem, however, to have no application to the instant situation since, by its very terms, the limitation period covering claims for refund of estate taxes is applicable only to those taxes 'alleged to have been erroneously or illegally assessed or collected.' It says nothing about 'overpayments' " (Emphasis ours).

This case goes further than others. It recognizes "the rule" in the *Huntley case* as established without question. This case, like all others, directly supports respondent's contention.

The only answer which the Government attempts to give for the well-considered cases of the various courts above referred to is that they all followed the case of *Huntley* v. *Southern Oregon Sales, supra*, and that no independent consideration or investigation was given, and therefore all of the cases are wrong.

Every one of the decisions cited was by unanimous opinion of the court, the only exception being the dissenting opinion of Justice Huxman in this case.

We find in the opinions that in most of the cases the courts themselves say that they have given due, careful, and independent consideration to the question.

In *Godfrey* v. *United States, supra*, the court says: "After careful consideration I have come to the conclusion" that the four-year and not the two-year statute applies.

In *United States* v. *Lederer Terminal Warehouse, supra*, the court says: "The conclusion which has been reached is in consonance with *Huntley* v. *Southern Oregon*

Sales," thus clearly stating that the court had made an independent investigation and had come to the same conclusion.

The Circuit Court of Appeals, in the instant case, states:

> "It is enough to say that we have examined it (legislative history) with care, and we do not think it necessarily supports the contention". (R. 22).

And in practically every other case we find statements of the court clearly indicating "careful consideration and examination with care."

In the instant case it seems that this Court will give extraordinary consideration to these decisions. The courts are scattered throughout the length and breadth of the United States—the Circuit Courts of Appeals of the Second, Sixth, Ninth and Tenth Circuits; the District Courts of California, Pennsylvania, South Dakota, New York, Illinois, Oklahoma, Michigan and Ohio. These courts practically cover the United States and represent the best legal ability, experience and thought in the United States outside of the Supreme Court of the United States itself.

Such decisions, backed by reason and common sense, will receive due consideration by this Court.

CONGRESSIONAL APPROVAL

The United States Circuit Court of Appeals very effectively pointed out that Congress had approved the interpretation of these statutes in the following language:

"Another well recognized rule lends its strength to the conclusion that the time for the filing of a claim of this kind is governed by Section 3313, not Section 332. The case of *Huntley* v. *Southern Oregon Sales, Inc., supra*, was decided almost eight years ago, and the later cases citing it with approval and reaching the same conclusion followed. During that period Congress convened from time to time, enacted revenue legislation, and by Section 5 of the Act of July 31, 1945; 59 Stat. 511, 523, amended Section 322, all without indicating in any manner its disapproval of the judicial interpretation placed upon the two sections. That, in composite effect should be regarded as congressional approval and adoption of the interpretation placed by the courts upon the two statutes. *Sessions* v. *Romadka*, 145 U. S. 29; *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U.S. 320; *United States* v. *Elgin, Joliet & Eastern Railway Co.*, 298 U. S. 492; *Missouri* v. *Ross*, 299 U. S. 72; *Electric Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5. True, none of the cases construing the two sections was by the Supreme Court of the United States, but the rule of uniform judicial construction of a statute over a long period of time being regarded as acceptable to the legislative arm of the government has appropriate application where legislation dealing with the general subject matter has been enacted and the particular statute has been amended, without any action or expression indicating legislative disapproval of the judicial construction, even though the construction was by circuit courts of appeal and district courts of the United States. *Manhattan Properties, Inc.* v. *Irving Trust Co., supra.*"

In the brief of the Government, as well as in the dissenting opinion of Justice Huxman, there is an attempt to answer the above statement by simply stating that there was no showing in this case that Congress had any knowledge of the interpretation of the statute. Quoting from Justice Huxman:

"A decision by the Supreme Court is much more likely to come to the attention of Congress than a decision by a lower court" (R. 27).

Conceding the correctness of this statement, it materially loses its force when applied to the facts here, on which we have the decisions of eight district courts and five circuit courts of appeals, extending over a period of approximately eight years.

Approval of the Congress is shown by the majority opinion below, calling attention to the fact that Section 322 was amended by the Act of July 31, 1945. In addition, Congress has passed nine acts affecting income tax since 1939 and has in no way amended the statutes here involved, thus absolutely approving the interpretation that had been placed thereon.

GOVERNMENT ACQUIESCENCE

It appears that the action of the Internal Revenue Department and of the Justice Department of the United States in acquiescing so long in the decisions of the various circuit courts and district courts should have its proper weight here.

The circuit court of appeals in this case called attention to the fact that the principle for which the respondent here contends was decided by a United States District Court in the year 1939, almost eight years before this case was filed.

The Government, in its brief in the lower court, stated that in this case for the first time it presented its discus-

sion on legislative history. From 1939 to 1946 the Government had contended that legislative history had no place and was "improper."

In 1939 the Government had formally announced that no petition for *certiorari* had been filed in the case of *Huntley* v. *Southern Oregon Sales, supra* (*Prentice-Hall Federal Tax Service*, 1939, Vol. 1, 4.35). Later and in 1943 no petition for *certiorari* was filed in the more important case of *United States* v. *Lederer Terminal Warehouse Company, supra.*

In the case at bar the Commissioner announced that the "decision in the case of *U. S.* v. *Lederer Terminal Warehouse Company* cited by you is not followed by the Bureau" (R. 9).

Acquiescence by the Department of Justice and the Internal Revenue Department will be given consideration.

LEGISLATIVE HISTORY

From the above it would appear that investigation into legislative history is unnecessary if not "improper," as contended by the Department of Justice until 1945.

However, if this Court is to give consideration to the legislative history, we call specific attention to *Huntley* v. *Southern Oregon Sales, supra*, decided in 1939. There the court went into great detail concerning the legislative history of these two Acts, and came to the conclusion that the Congress of the United States intended that the refund of overpayment of a legally assessed income tax

should be governed by Section 322 and that the refund of an erroneously or illegally assessed or collected income tax was governed by Section 3313.

No one in the Department of Justice or the Internal Revenue Department questioned this exhaustive legislative history until the Liberty Glass Company filed this suit for $1,000 plus in the State of Oklahoma. After a most exhaustive investigation, the Justice Department comes to the conclusion that the court in that case was wrong, and for two reasons: (1) That the court failed to take into consideration a letter written by the Honorable Andrew Mellon, Secretary of the Treasury in 1923; and (2) that that court considered Seidman's Legislative History of Federal Income Tax Laws, which did not mention Andrew Mellon's letter.

There is nothing in the record to show that the court in the *Huntley case* did not consider Mr. Mellon's letter. It is true that his letter is not mentioned in the opinion, but from a careful reading of the letter itself, as contained in the brief of the Government, it clearly appears that it is not of sufficient importance to be considered. There is no evidence that the Congress followed it, except in principle. This letter clearly shows that Mr. Mellon was attempting to get the Government by legislation to ratify what he had done by rule and regulation and which was of questionable legality. The letter shows that the Secretary of the Treasury at that time was giving the taxpayer by rule four years to file his claim for refund after payment of illegal tax.

In the report to Congress, which the Committee of Ways and Means presented in 1923, together with a copy of the Mellon letter, one paragraph is as follows:

> "Where a tax has been paid under the provisions of Sections 221 or 237 in excess of that properly due, any refund or credit made under the provisions of this section *or Section 3228 of the Revised Statutes* shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent." (Emphasis ours.) (H. Rep. No. 1424, 67th Cong., 4th Sess., P. 2.)

The opinion of the Circuit Court of Appeals in 1939, which has been followed "after careful consideration" by the numerous courts above set out, coupled with Seidman's History of Federal Tax Legislation, should be given extraordinary weight.

This Court will give consideration to those who have investigated legislative history from an unprejudiced and unbiased standpoint.

STATUTE OF LIMITATIONS STRONGLY CONSTRUED IN FAVOR OF TAXPAYER

All tax laws are construed by the courts favorably to the taxpayer, and this principle is especially true when the law is a statute of limitations. Statutes of limitations are only statutes of expedience, and while it is recognized that they are important and necessary for the principal purpose of fairness to everyone concerned, and in order to expedite the administration of tax collection, yet it has always been the rule of this Court that whenever a doubt exists, it should be construed in favor of the taxpayer.

The Government admits that the tax was originally paid illegally, which makes the exhaustive and technical investigation of the Department of Justice difficult to understand.

The general rule that tax statutes should be construed in favor of the taxpayer is set out in *Allegheny Heating Co.* v. *Lewellyn*, 91 Fed. (2d) 280.

Also in *Gould* v. *Gould*, 245 U. S. 151, it is stated:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. *In case of doubt they are construed most strongly against the Government, and in favor of the citizen.*" (Emphasis ours.)

REPLY TO BRIEF OF THE PETITIONER

We received the very exhaustive brief of the Government in this case on the 29th day of October, 1947. The argument is divided into subheads lettered A, B, C, D, E and F. We will reply in that order.

A. OVERPAYMENT

Throughout the brief one of the chief arguments is the contention that "overpayment" as used in Section 322, means the same as "erroneously or illegally assessed or collected," as used in Section 3313. Examples are used to show what a ridiculous result would be had if overpayment did not include taxes "erroneously or illegally assessed and collected." It seems clear that overpayment

could mean the same as erroneously or illegally assessed or collected, but that is entirely beside the question. The question is: Does it mean the same when used in these sections?

To say that the word "overpayment" must mean the same under all conditions is almost as unreasonable as to say that the word "satisfied" should be construed as meaning the same under all conditions. For example, a man might say: "I am satisfied with my home life." Again the same man might properly say, "I am satisfied that my son is a bank robber." Yet under the argument, if the courts were presented with the responsibility of interpreting the word "satisfied," in both instances they must be interpreted to mean the same—a most unreasonable contention.

It is not the purpose in this case to determine what the word "overpayment" might include, in any other part of the law, nor what the word generally means, as stated by Justice Huxman in his dissenting opinion. Many words in the English language have a different meaning when used in a different way.

The question here is: Does the expression "overpayment of any (legal) tax imposed by this chapter" mean the same as a tax "erroneously or illegally assessed or collected?"

We think it is clear that the examples given in the Government's brief concerning the meaning of this word in the matter of appeals to the Tax Board, and the use of

this word in many other places in the statute, as well as its general meaning, become immaterial.

B. LEGISLATIVE HISTORY

The Government's brief presents a most exhaustive discussion of legislative history, which we have heretofore discussed. This same contention was made in the lower courts. We think our brief in chief is a sufficient reply.

C. ADMINSTRATIVE PRACTICE

Here is an attempt to show that the decision below is contrary to the "consistent, unambiguous, and long-established practice." Under this heading is cited a large number of cases decided by the Supreme Court of the United States and the district and circuit courts in a feeble attempt to show the construction of Section 322 has been "assumed without question."

Apparently neither the courts nor the attorneys on either side of any of the cases gave any thought to the question in the instant case.

Also numerous rulings of the Treasury Department made in 1922, 1923 and 1924, are cited. All of these rulings appear to be prior to the 1924 amendment of the statute on which the Government's brief relies. Any ruling prior to that time would have no effect; but it is evident that the courts in the *Huntley case* and all cases since that time were of the opinion that the Government was wrong, so any ruling of the Government would have little effect in this case.

If this matter is so material to administrative convenience and necessity, may we suggest that the Treasury Department should direct its attention to the clarification of the Statute of Limitations by the Congress, with a view to eliminating the alleged confusion. Such action would eliminate unnecessary litigation and lighten the burden of the courts, and would require less effort by the Justice and Revenue Departments.

D. OTHER SECTIONS AFFECTED

Here the contention is made concerning the effect of this interpretation upon other sections of the statute. This matter we have heretofore discussed in this brief. We repeat that a decision in this case will not determine what the word "overpayment" might mean generally or in other places in the revenue laws.

E. LOWER COURT CASES

Only six pages is devoted to the discussion of the numerous cases heretofore decided by all of the district courts and circuit courts of appeals, which we have heretofore discussed in this brief. The argument effectively shows that "Everybody is out of step" except the Justice and Revenue Departments.

F. LEGISLATIVE ACQUIESCENCE

Here is an attempt to minimize the importance of legislative approval, which we have heretofore discussed in connection with the findings of the Circuit Court of Appeals in the instant case.

INTEREST

Interest on claims for refund is discussed on Page 38 of petitioner's brief. This is not proper in this case for three reasons:

(1) It was agreed that if respondent prevailed, it would be entitled to "interest as provided by law" (R. 12).

(2) The argument is a repudiation of the contention that "overpayment" must be construed as meaning exactly the same no matter how used in all of the revenue laws.

(3) The courts have decided the question.

In *Sbarbaro* v. *United States, supra,* it is stated:

"There remains the question of interest on said claim for refund. * * * The key word in the sentence is 'overpayment' and defendant states that since plaintiffs have insisted upon a distinction between that term as used in Section 322 and that of 'erroneously and illegally assessed or collected' under Section 3313, they are also bound to that interpretation so far as the term 'overpayment' in the interest section is concerned. However, it appears that plaintiffs were not indulging in a literal construction of 'overpayment' since judicial interpretation and legislative intent have given the definition that which they attribute to it. *The definition of any statutory term is conditioned by the intent with which the term is used within the section.*" (Emphasis ours.)

CONCLUSION

The decision below is based upon law, reason and justice, and is supported by the decisions of all of the courts

to which the question has been presented. It should be by this Court affirmed.

Respectfully submitted,

EARL FOSTER,
Oklahoma City, Oklahoma,
Attorney for Respondent.

NOVEMBER, 1947.

FILE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 71

H. C. JONES, Collector of Internal Revenue,
Petitioner,

VERSUS

LIBERTY GLASS COMPANY,
Respondent.

PETITION FOR REHEARING

EARL FOSTER,
Oklahoma City, Oklahoma,
Attorney for Respondent.

JANUARY, 1948.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 71

H. C. JONES, Collector of Internal Revenue,

Petitioner,

VERSUS

LIBERTY GLASS COMPANY,

Respondent.

PETITION FOR REHEARING

Comes now the respondent in the above entitled cause and respectfully presents to the honorable Supreme Court of the United States that on the 22nd day of December, 1947, an opinion was rendered in this cause reversing the judgment of the United States Circuit Court of Appeals for the 10th Circuit.

That said opinion overlooked and misconstrued certain facts which are decisive in this case and were duly presented by counsel and shown by the record.

PROPOSITION I

That said opinion on Page 7 of the printed copy sent out by the clerk of this Court makes the following statement:

> "Overpayments are said to refer *solely* to excess payments resulting from errors by taxpayers in the preparation of their returns or in related activities, while erroneous or illegal assessments and collections are claimed to relate to various kinds of errors on the part of revenue agents." (Emphasis ours.)

We have re-examined our brief and we find no such contention made nor do we have any recollection of making any such contention in our oral argument.

As shown by our original brief, we believe that overpayment as used in Section 322 of the Internal Revenue Code refers to payments that were made by reason of any error, whether it was by the taxpayer in the preparation of his return or by the Internal Revenue Agent in computing the amount actually due the taxpayer. That taxes "erroneously or illegally assessed or collected," as used in Section 3313 of the Internal Revenue Code, refers to a tax that was absolutely illegal and was tax collected without any legal authority, although in computing the tax neither the taxpayer nor the Internal Revenue agent made any error whatsoever.

PROPOSITION II

That said opinion at Page 7 further states as follows:

> "Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law."

We respectfully submit that the payment of the tax in the instant case cannot "be traced to an error in mathematics or in judgment or in interpretation of facts or law"; that the tax paid in the instant case was an illegal tax and cannot be traced to any of the matters mentioned.

PROPOSITION III

On Page 9 of the printed copy of the opinion it is stated as follows:

> "The arrangement whereby all income tax refund claims are to be governed by what is now 322 (b) (1) was established in an unmistakable manner nearly a quarter of a century ago, an arrangement that has been continued through various reenactments and changes in the revenue laws. *And that arrangement has been consistently recognized and followed by the Treasury Department.*" (Emphasis ours.)

The learned justice seems to place great emphasis upon the consistency with which the Treasury Department has followed the principle announced in this decision. The record in this case seems very clear to us to show that the Treasury Department has been *inconsistent* in its recognition of the principle involved herein. The Treasury Department has, *by rule and regulation*, consistently followed the principle announced in this opinion, but, *by its conduct*, since 1939 it has been most inconsistent in following this principle. The Circuit Court of Appeals, in 1939, in the *Huntley case*, definitely announced that the principle theretofore followed by the Treasury Department was erroneous and promulgated a different principle. The Treasury De-

partment, and the Justice Department, its attorneys, announced that no writ of *certiorari* would be filed. To all taxpayers in the United States did this not in substance amount to a public announcement that the decision was correct? At least the Government told the taxpayers publicly and officially that it was not going to appeal, but according to its attitude when dealing with each individual taxpayer thereafterwards it refused to follow the principle. This does not seem to us to be consistent, and if this were all the inconsistency of the Treasury Department it would not be so apparent.

Thereafterwards, and during the years 1939, 1940, 1941, 1942, 1943, 1944 and 1945 the various cases referred to in our brief and acknowledged by the Department of Justice and by this Court to have followed the *Huntley case* were handed down by the various district courts and circuit courts of appeals throughout the United States, and no one of those cases during all of those years was appealed to the Supreme Court of the United States. No petition for writ of *certiorari* was ever filed in any of those cases. So in effect the Treasury Department announced on these numerous occasions that no *certiorari* would be filed, the same as he had done in the *Huntley case;* yet during all of those years to each taxpayer it took an entirely different position. He told each taxpayer that he was not recognizing these cases; even wrote to the Liberty Glass Company a letter to that effect, but before the courts and to the public generally he certainly recognized the principle announced in that case, at least he did

nothing to indicate that he considered those cases wrong in principle. Therefore, during the years from 1939 to 1946 taxpayers who filed refunds for income tax within four years and brought suit in any district court of the United States, *collected their money*, but those taxpayers who followed the "arrangement" of the Treasury Department *failed to collect their money*. In each case the tax was collected illegally. We respectfully submit that if this is *consistency* we are unable to understand what that word means.

However, in the case at Bar, the Government did publicly and before the courts, become consistent with what his position had been prior to 1939. Here again it appears to us that the Treasury Department was most inconsistent. The case at Bar involves only $1,000.00 plus. It is an admitted fact that the many cases decided between 1939 and 1946 involved thousands of dollars. Is it consistency for the Treasury Department to permit some eight or ten taxpayers over a period of approximately nine years to collect on claims for refund by action in the courts many thousands of dollars and then for some reason unknown to us it is important that the case of the Liberty Glass Company involving a little more than One Thousand Dollars should be appealed to the Supreme Court of the United States, remembering that the lower courts, both district and circuit court of appeals, had passed favorably upon this question in this case exactly as was done in all of the other cases? We respectfully submit

that it is most difficult to harmonize the opinion of the learned justice in this case with the facts and circumstances that are and have been at all times admitted by the Treasury and the Justice Departments.

PROPOSITION IV

We call attention to the last sentence of the opinion.

> "That is true even though the claim arose out of an income tax alleged to have been erroneously or illegally assessed or collected."

This presents a question that apparently has been definitely decided by this Court in the instant case, but we cannot refrain from again stating that it is going a long ways to hold that "overpayment of tax" means exactly the same as "erroneous or illegally assessed or collected" tax.

PROPOSITION V

The decision in this case nowhere mentions and apparently does not consider that rule of law thoroughly established by this Court, and every other court which was referred to in our briefs and oral argument, which is substantially that in all cases involving taxation all doubt will be resolved in favor of the taxpayer, and more especially when the question involved is a statute of limitations. In this case the Government collected from my client money that was not due to the Government. The Government so admits. It has no moral right to keep the money. It does have a legal right to keep it if we fail

to act in time. Certainly, in cases of this kind, every possible doubt should be resolved in favor of the taxpayer. Government exists for the benefit of the citizens and taxpayers. To take money that was originally illegal is bad in itself, but to refuse to pay it back is a very serious matter, not only because of the interest of the individual taxpayer but from a public policy standpoint. Our American customs and institutions have been established in such a way that any man who refuses to pay his just private debts because of a statute of limitations is looked upon with suspicion, and while I fully realize that the Supreme Court of the United States must and will follow the law regardless of how it affects any individual I most respectfully submit that since we have established our social and political order in such a way that an individual is looked upon with suspicion who claims the statute of limitations to avoid his just debts, that the courts, and especially the Supreme Court of the United States, should resolve every doubt in favor of the taxpayer in order that he may have returned to him that to which he was in law and morals entitled, except that he fail to file his claim in time. This is especially applicable in this case, because there is surely a *doubt* here, since so many able judges in the district and Circuit Courts of Appeals throughout the United States, and one eminent justice of this Court, all dissent from the majority opinion.

CONCLUSION

We most respectfully submit that this petition for rehearing should be granted, and the case reconsidered and the lower court's opinion affirmed.

Respectfully submitted,

EARL FOSTER,
Oklahoma City, Oklahoma,
Attorney for Respondent.

JANUARY, 1948.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 71

H. C. JONES, Collector of Internal Revenue,
Petitioner,

VERSUS

LIBERTY GLASS COMPANY,
Respondent.

CERTIFICATE ON PETITION FOR REHEARING

I, EARL FOSTER, on oath state:

That I am attorney for the respondent in the above styled cause, and do hereby certify that the Petition for Rehearing this day filed in this Court is presented in good faith and not for the purpose of delay.

Subscribed and sworn to before me this _____ day of January, 1948.

Notary Public.

My commission expires: November 3, 1951.

(The original of the above certificate is attached to Service Copy of this Petition for Rehearing.)

SUPREME COURT OF THE UNITED STATES

No. 71.—October Term, 1947.

H. C. Jones, Collector of Internal Revenue, Petitioner, v. The Liberty Glass Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[December 22, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

Our concern here is with the period of limitations applicable to the filing of claims for refund of federal income taxes. Must such claims be filed within two years after payment of the tax, as provided by § 322 (b) (1) of the Internal Revenue Code, or within four years after payment of the tax, as provided by § 3313 of the Code?

The corporate taxpayer, respondent herein, filed its income and excess-profits tax return for 1938, a return which indicated a tax liability of $1,193.25. This sum, plus a small additional assessment, was paid in 1939. A revenue agent later investigated the taxpayer's liability again, resulting in an additional assessment of $6,640.81. Payment of this amount was made on March 8, 1941. Over three years later, on March 30, 1944, the taxpayer filed a claim for refund of $1,053.49. It was stated that the revenue agent erroneously had failed to allow certain credits for sums used by the taxpayer in 1938 to reduce its indebtedness. Reliance was placed by the taxpayer on the four-year limitation period specified in § 3313. The Commissioner of Internal Revenue rejected this claim, pointing out that § 3313 specifically exempts from its application income, war-profits, excess-profits, estate and gift taxes.

This suit was then brought by the taxpayer in the District Court to recover the amount alleged by the refund claim to be due. That court held that § 3313 was applicable and gave judgment for the taxpayer. 66 F. Supp. 254. The Tenth Circuit Court of Appeals, one judge dissenting, affirmed the judgment. 159 F. 2d 316. The problem being one of importance in the administration of the revenue laws, we granted certiorari.

Section 322 (b) (1) is to be found in Subtitle A of the Internal Revenue Code, a subtitle dealing with those taxes over which the Tax Court has jurisdiction. Such jurisdiction includes income, excess-profits, estate and gift taxes. More specifically, § 322 (b) (1) appears under Chapter 1 of the Code, pertaining to income taxes. It is concerned with overpayments of income taxes and provides quite simply that no refund shall be allowed unless a claim for refund "is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid."[1]

Section 3313, on the other hand, is located under Subtitle B of the Code, a subtitle devoted to miscellaneous taxes. It is in Chapter 28, which contains various provisions common to such taxes. And it is among those provisions dealing with the assessment, collection and refund of the taxes. It reads as follows: "All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income,

[1] The return in this case was filed in June, 1939. Since the claim was filed on March 30, 1944, no contention could be made that it was within the three-year period from the date the return was filed.

war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

The substance of § 3313 of the Code has long been a part of federal statutory law. Its ancestry can be traced back to 1872, when § 3228 of the Revised Statutes was enacted.[2] Section 3228 established a procedure for filing claims for refund of any internal revenue tax alleged to have been "erroneously or illegally assessed or collected" and created a limitation period of two years from the time the cause of action accrued, later extended in 1921 to four years from the date of payment of the tax.[3] But soon after the entry of the income tax into the federal scene in 1913, separate provision was made for the filing of claims for refund of income taxes "paid in excess of those properly due." Section 14 (a) of the Revenue Act of 1916[4] was the first such provision and it made clear that § 3228 was inapplicable to claims of this nature. Section 252 of the Revenue Act of 1918,[5] followed by § 252 of the 1921 Act,[6] continued this scheme of separate treatment. These later provisions were written so as to include refund claims relating to war-profits and excess-profits taxes as

[2] Section 3228 was in the nature of a revision of § 44 of the Act of June 6, 1872, 17 Stat. 230, 257.

[3] Revenue Act of 1921, § 1316, 42 Stat. 227, 314.

[4] 39 Stat. 756, 772. This provided that the claim for refund might be presented "notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes."

[5] 40 Stat. 1057, 1085.

[6] 42 Stat. 227, 268.

well as those involving income taxes; and a limitation of five years from the date the return was due was placed on the filing of such claims. It was further specified that the procedure therein detailed was to be followed "notwithstanding the provisions" of § 3228.

Section 252, as it appeared in the 1921 Act, was then changed in 1923[7] so as to permit claims for refund of income and profits taxes "paid in excess of that properly due" to be filed within two years after the tax was paid, in addition to the five-year period after the due date of the return. This change was made "so that the taxpayer who has, by agreement with the Treasury, permitted the time for the final assessment of the taxes due from him to be made after the expiration of the five-year period, will not be barred from making a claim for a refund when such assessment is made and the taxpayer *alleges that*

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[7] Act of March 4, 1923, 42 Stat. 1504, 1505. In amending § 252, the Act of March 4, 1923, made mention of refunds of income taxes to withholding agents which might be made under the provisions of "section 3228 of the Revised Statutes." This was an obvious reference to the practice of the Treasury Department, admitted to be of "very doubtful legality," H. Rep. No. 1424, 67th Cong., 4th Sess., p. 2, of allowing a taxpayer who had permitted an additional assessment after the five-year period from the due date of the return (specified by § 252 of the 1921 Act) to file a claim for refund within four years after payment of the tax (pursuant to § 3228), even though the five-year period had elapsed. The Treasury had instituted this practice to prevent inequities which might otherwise ensue to such taxpayers, but it was without legislative sanction. It was to take care of the taxpayers who had taken advantage of the Treasury practice that the reference in question in the Act of March 4, 1923, was made. As to claims pending on March 4, 1923, which were timely filed under § 3228, but not timely under § 252, refunds to withholding agents were necessarily to be made under § 3228. This provision was not repeated in subsequent legislation and it was not indicative of a legislative intent to permit income tax refund claims to be governed by § 3228 in the future.

the assessment is illegal."[8] Amending § 252 rather than § 3228 of the Revised Statutes to accomplish this purpose was significant. It was an unequivocal indication that § 252, in speaking of claims for refund of "excess" payments of income and profits taxes, was designed by its framers to include not only those payments growing out of errors in the preparation of returns but also those payments resulting from illegal or erroneous assessments. See *Graham* v. *duPont*, 262 U. S. 234, 258.

The Revenue Act of 1924[9] transferred the substance of the former § 252 to a new § 281. A four-year period of limitations from the date of the payment of the tax was established, a period coinciding in length with that prescribed by § 3228. The reference to the type of payments involved was recast; in place of speaking of payments "in excess of that properly due," § 281 used the simple term "overpayments."[10] And instead of stating in § 281 that its provisions should apply "notwithstanding the provisions" of § 3228 of the Revised Statutes, § 3228 itself was amended[11] to make it applicable to all claims for the refunding or crediting of any internal revenue tax "except as provided in section 281 of the Revenue Act of 1924." This placing of an exceptive clause in § 3228 was done "to remove the doubt which now exists as to whether or not the provisions of section 3228, Revised Statutes, apply in any event to income

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[8] Emphasis added. H. Rep. No. 1424, 67th Cong., 4th Sess., p. 2; S. Rep. No. 1137, 67th Cong., 4th Sess., p. 2.

[9] 43 Stat. 253, 301.

[10] The Revenue Act of 1924, 43 Stat. 253, 296, also created a new § 272, dealing with "overpayments" of income tax installments. This spoke of overpayments in the sense of payments of "more than the amount determined to be the correct amount of such installment." This provision now exists as § 321 of the Internal Revenue Code.

[11] 43 Stat. 253, 342.

taxes." [12] In other words, the statutory drafters intended to make certain that § 3228 was in no event to apply to income tax refund claims. Such claims were to be governed exclusively by § 281.

The essence of § 281 of the 1924 Act has been carried through to the present § 322 of the Internal Revenue Code.[13] The only significant change in the interval, for our purposes, was a reduction in the period of limitations, as measured from the payment of the tax, from four years to three years and finally to two years. And § 3228 of the Revised Statutes, as amended to state that it applies "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes," has become the current § 3313 of the Code.

With this background in mind, we find the pattern of limitation periods for tax refund claims to be clear. Section 3313 of the Code establishes a four-year period for all internal revenue taxes, except as otherwise provided by law in the case of specified taxes. Among the latter is the income tax, as to which § 322 (b) (1) makes provision "otherwise" by requiring that refund claims be presented within two years of payment or within three years from the filing of the return. Provisions are also made "otherwise" in the case of the estate tax (§ 910 of the Code) and the gift tax (§ 1027 of the Code).

The argument is made, however, that § 322 (b) (1) deals only with income tax "overpayments" and not with income taxes "erroneously or illegally assessed or col-

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[12] H. Rep. No. 179, 68th Cong., 1st Sess., p. 71; S. Rep. No. 398, 68th Cong., 1st Sess., p. 44. This quotation was taken verbatim by the Congressional committees from the statement of A. W. Gregg of the Treasury Department, Statement of the Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, Senate Committee Print, 68th Cong., 1st Sess., March 6, 1924, p. 37.

[13] See Revenue Act of 1926, § 284, 44 Stat. 9, 66; Revenue Act of 1928, § 322, 45 Stat. 791, 861; Revenue Act of 1932, § 322, 47 Stat. 169, 242; Revenue Act of 1934, § 322, 48 Stat. 680, 750.

lected." Overpayments are said to refer solely to excess payments resulting from errors by taxpayers in the preparation of their returns or in related activities, while erroneous or illegal assessments and collections are claimed to relate to various kinds of errors on the part of revenue agents. Since there is no provision "otherwise" for income tax refund claims involving the latter type of errors, the conclusion is reached that the four-year limitation period of § 3313 remains applicable. We cannot agree.

In the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used. See *Rosenman* v. *United States*, 323 U. S. 658, 661. Hence we read the word "overpayment" in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.

That this ordinary meaning is the one intended by the authors of § 322 (b) (1) is quite evident from the legislative history which we have detailed. The word "overpayment" first appeared in § 281 of the 1924 Revenue Act, one of the direct ancestors of § 322 (b) (1). The word was there used as a substitute for the previous reference to payments "in excess of that properly due," a phrase that is a perfect definition of an overpayment and that is not necessarily confined to overpayments occasioned by errors made by taxpayers. The immediate predecessor of § 281 had employed that phrase and had been enacted in 1923 with the expressed intention of including claims growing out of illegal assessments. There was not the slightest indication that the substitution of the word "overpayment" was designed to narrow the scope of § 281.

It apparently was a mere simplification in phraseology. But it does make clear the sense in which the word was first used in this context. The generic character of the word was emphasized from the start.[14] And we see no basis for making it over into a word of art at this late date.

The legislative history further reveals a consistent intention to make a separate and complete limitation provision for income tax refund claims, whatever might be the underlying basis of the claims. Section 322 and its predecessors were devised in order to provide such an exclusive scheme. Claims relating to the income tax have at all times been explicitly excluded from § 3313.[15] This arrangement is but part of the general plan evident in the Internal Revenue Code of providing separate treatment for the income, profits, estate and gift taxes, as distinct from the miscellaneous taxes and the excise, import and temporary taxes. We would be doing unwarranted violence to this clear demarcation were we to read the word "overpayment" so as to place certain types of income tax refund claims within the scope of § 3313, a section

[14] Section 272 of the 1924 Act (now § 321 of the Code) referred to "overpayments" of income tax installments as payments of "more than the amount determined to be the correct amount of such installment." See note 10, *supra*. Such a definition admits of no distinction between errors by the taxpayer and errors by the revenue agents.

[15] Reference should also be made to the second sentence of § 3313, providing that the amount of refund may not exceed the amount of tax paid during the four-year period. There is a parenthetical phrase in this sentence which specifically excludes income, war-profits, excess-profits, estate and gift taxes. If the first sentence of § 3313, establishing the four-year limitation period, applied to income tax refund claims arising out of illegal assessments, there would be no limit on the amount of refund by reason of this second sentence. Such a result is without support in the purpose or history of the provisions dealing with these refund claims.

that has always been divorced from the income tax portion of the revenue laws.

It is pointed out, however, that various lower federal courts, beginning in 1939, have reached a contrary result.[16] They have held that § 3313 rather than § 322 (b) (1) governs refund claims for income taxes alleged to have been "erroneously or illegally assessed or collected." Since Congress has subsequently convened from time to time and has amended § 322 in other respects without expressly disapproving this interpretation, the contention is advanced that legislative acquiescence in the interpretation must be assumed. But the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. See *Helvering* v. *Reynolds*, 313 U. S. 428, 432. Here the language and the purpose of Congress seem clear to us. The arrangement whereby all income tax refund claims are to be governed by what is now § 322 (b) (1) was established in an unmistakable manner nearly a quarter of a century ago, an arrangement that has been continued through various reenactments and changes in the revenue laws. And that arrangement has been consistently recognized and fol-

[16] *Huntley* v. *Southern Oregon Sales*, 102 F. 2d 538, was the first case so holding. Subsequent decisions of the same tenor have relied in large part upon the *Huntley* case. *Olsen* v. *United States*, 32 F. Supp. 276; *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679; *In re Tindle's Estate*, 59 F. Supp. 667, affirmed *per curiam sub nom. Pennsylvania Co. for Insurances on Lives* v. *United States*, 152 F. 2d 757; *Godfrey* v. *United States*, 61 F. Supp. 240; *Noble* v. *Kavanagh*, 66 F. Supp. 258, affirmed *per curiam*, 160 F. 2d 104; *Sbarbaro* v. *United States*, 73 F. Supp. 213. See also *Fawcett* v. *United States*, 70 F. Supp. 742. Compare *Central Hanover Bank & Trust Co.* v. *United States*, 67 F. Supp. 920. In many cases, however, the applicability of § 322 (b) (1) to claims of the type here involved was assumed without question and without an explicit holding on the point. See, for example, *United States* v. *Garbutt Oil Co.*, 302 U. S. 528.

lowed by the Treasury Department.[17] Under those circumstances, it would take more than legislative silence in the face of rather recent contrary decisions by lower federal courts to overcome the factors upon which we have placed reliance. Cf. *Electric Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14; *Missouri* v. *Ross*, 299 U. S. 72, 75; *United States* v. *Elgin, J. & E. R. Co.*, 298 U. S. 492, 500. We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action.

We accordingly conclude that all income tax refund claims, whatever the reasons giving rise to the claims, must be filed within three years from the time the return was filed or within two years from the time the tax was paid, as provided in § 322 (b) (1). The four-year period prescribed by § 3313 is inapplicable to such claims. Since respondent filed its income tax refund claim more than three years after filing the return and more than two years after payment of the tax, its claim was out of time. That is true even though the claim arose out of an income tax alleged to have been "erroneously or illegally assessed or collected."

Reversed.

MR. JUSTICE DOUGLAS dissents.

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[17] See I. T. 1447, I–2 Cum. Bull. 220 (1922); T. D. 3457, II–1 Cum. Bull. 177 (1923) and T. D. 3462, amending Regulations 62, II–1 Cum. Bull. 180 (1923); S. M. 1712, III–1 Cum. Bull. 345 (1924); S. M. 2293, III–2 Cum. Bull. 310 (1924); G. C. M. 3152, VII–1 Cum. Bull. 153 (1928); G. C. M. 13759, XIII–2 Cum. Bull. 102 (1934); Mim. 4814, 1938–2 Cum. Bull. 96; I. T. 3483, 1941–1 Cum. Bull. 397.

The present Treasury viewpoint is codified in Treasury Regulations 111, promulgated under the Internal Revenue Code, § 29.322–3 and § 29.322–7. See also Treasury Regulations 103, promulgated under the Code, § 19.322–3 and § 19.322–7, as amended by T. D. 5256, 1943 Cum. Bull. 550; and Treasury Regulations 101, promulgated under the Revenue Act of 1938, Articles 322–3 and 322–7.